Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DARLENE JENKINS,

Petitioner,

v.

GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Must a plaintiff show that a defendant *intended* to violate the Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.*, in order to allege a violation of the Act?
2. Does the bona fide error defense of the FDCPA, 15 U.S.C. §1692k(c), eliminate debt collection attorneys' obligation to exercise legal judgment while collecting debts through litigation?
3. Can an error of legal judgment be a bona fide error for the purposes of the bona fide error defense of the FDCPA, 15 U.S.C. §1692k(c)?

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PREVIOUS OPINIONS

The citations of the official and unofficial reporters of the opinions and orders entered in this case, in chronological order, are as follows:

Defendants' motion to dismiss granted by the United States District Court for the Northern District of Illinois: unreported.

Decision of the United States District Court for the Northern District of Illinois reversed and remanded by the United States Court of Appeals for the Seventh Circuit: *Jenkins v. Heintz*, 25 F.3d 536 (7th Cir. 1994).

Certiorari granted by this Court: *Heintz v. Jenkins*, 513 U.S. 959, 115 S.Ct. 416, 130 L.Ed. 2d 332 (1994).

Decision of the United States Court of Appeals for the Seventh Circuit affirmed by this Court: *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995).

Defendants' motion for summary judgment granted by the United States District Court for the Northern District of Illinois: unreported (App. 30-47).

Decision of the United States District Court for the Northern District of Illinois affirmed by the United States Court of Appeals for the Seventh Circuit: *Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997) (App. 1-29).

Petition for rehearing *en banc* denied by the United States Court of Appeals for the Seventh Circuit: unreported (App. 48-49).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit upheld the decision of the United States District Court for the Northern District of Illinois granting summary judgment in favor of the respondents on August 26, 1997. The petitioner timely filed a petition for rehearing *en banc* on September 8, 1997, which was denied on October 23, 1997.

The petitioner now timely seeks a writ of certiorari. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

15 U.S.C. §1692k, 15 U.S.C. §1692b(6), 15 U.S.C. §1692c(a)(1), 15 U.S.C. §1692c(a)(2), 15 U.S.C. §1692c (a)(3), 15 U.S.C. §1692d(5), 15 U.S.C. §1692e(8), 15 U.S.C. §1692f(1), 15 U.S.C. §1692j, 15 U.S.C. §1640(c), 15 U.S.C. §45. Relevant portions of statutory texts are reproduced in the Appendix (App. 50-54).

STATEMENT OF THE CASE

The facts below are set forth in Plaintiff's Second Amended Complaint, reprinted in the Appendix (App. 55-65); Defendants' Motion for Summary Judgment; Plaintiff's Response to Defendants' Motion for Summary Judgment; and Plaintiff's Response to Defendants' Statement of Undisputed Fact.

In July 1987, Darlene Jenkins signed a retail installment sales contract for the purchase of a motor vehicle. The contract was assigned to Gainer Bank, now known

as NBD Bank. The contract provides that the borrower must keep the vehicle "fully insured against loss or damage," and that if the borrower fails to do so, the lender may purchase such insurance and add the premium to the borrower's loan balance.

After Ms. Jenkins had made 35 out of 48 payments due, the car was repossessed by NBD. Respondents were retained to collect a purported deficiency balance by filing suit against Ms. Jenkins in the Circuit Court of Cook County, Illinois. A substantial portion of the amount claimed to be due consisted of premiums for "force placed insurance."

This force placed insurance included "financial protection insurance" issued by Balboa Insurance Company. NBD charged the premiums for this coverage to Ms. Jenkins and to other consumers who had contracts identical to Ms. Jenkins' contract. This force placed insurance covered much more than loss or damage to the collateral—it also protected NBD against various types of defaults by the customer (such as expenses incurred in repossessing a car from a consumer upon default, mechanic's liens, and errors in perfecting security interests). Further, it indemnified NBD against liability under federal law as a result of a breach of warranty by a car dealer or manufacturer (the "holder in due course endorsement"). Finally, 30% of the "premium" was *retained* (presumably by NBD) as a "commission."

Nothing in Ms. Jenkins' motor vehicle retail installment contract allowed the bank to procure this additional insurance and charge it to the account of the consumer. The premiums charged to each class member total $2,000 to $4,000, plus interest charged on the premiums added to the consumer's loan balance.

Shortly after the state court action was filed, respondent Heintz sent a letter in an attempt to settle (*i.e.*, to collect the debt, which he knew consisted primarily of the force placed insurance premium). In that letter, respondents demanded payment of $4,173 in insurance premiums that had been added to the $3,000 principal at the time of repossession. The force placed insurance premiums greatly exceeded the value of the vehicle at the time of repossession (the vehicle sold at auction for $725). By the time the bank was finished adding insurance, the "balance in effect at the time of repossession" was approximately $8,500 on an original amount financed of $8,520.94 after Ms. Jenkins had paid approximately $8,285 (35 payments of $236.71).

Ms. Jenkins filed this action on behalf of a class in the United States District Court for the Northern District of Illinois to obtain relief for respondents' violation of the FDCPA. She alleged that respondents violated 15 U.S.C. §1692 by attempting to collect and collecting amounts charged for force placed insurance premiums that were not authorized by law or contract. The District Court exercised jurisdiction under 28 U.S.C. §1331 and 15 U.S.C. §1692k.

Respondents filed a motion to dismiss, which the District Court granted on July 27, 1993, holding that the FDCPA did not apply to attorneys engaged in litigation. Ms. Jenkins appealed to the Seventh Circuit, which reversed the dismissal on May 27, 1994. Respondents appealed to this Court, which granted certiorari and affirmed the Seventh Circuit's opinion on April 18, 1995, holding that the FDCPA applies to the debt collection activities of attorneys engaged in litigation. The case was

then remanded to the District Court for further proceedings.

Respondents next filed a motion for summary judgment, contending that they had no information or knowledge about the nature of the insurance coverage obtained by the bank. Respondents asserted that they were retained only to collect amounts claimed due and that none of their attorneys, agents or employees "acted in the capacity of corporate counsel" to the bank or had any "information" or "discussions" with the bank concerning the nature or extent of the coverages obtained by the bank pursuant to its loan contracts.

After a protracted discovery battle, Ms. Jenkins responded with numerous pieces of evidence showing that respondents did in fact possess a great deal of information about the possible illegality of the force placed insurance premiums. She provided evidence showing that respondents held discussions with NBD concerning the legality of the force placed insurance premiums. She also provided evidence showing that respondents rendered legal opinions to NBD concerning force placed insurance. Nonetheless, on September 17, 1996, the District Court granted summary judgment in favor of the respondents.

Ms. Jenkins timely appealed again to the Seventh Circuit, which affirmed the decision of the District Court on August 26, 1997, holding that (1) intent is an element of an FDCPA violation; (2) the bona fide error defense of the FDCPA, 15 U.S.C. §1692k(c), eliminates the obligation of debt collection attorneys to exercise legal judgment while collecting debts through litigation; and (3) an error of legal judgment can be a bona fide error for the purposes of the bona fide error defense of the FDCPA, 15 U.S.C. §1692k(c).

Ms. Jenkins timely filed a petition for rehearing *en banc* in the Seventh Circuit on September 8, 1997, which was denied on October 23, 1997. She timely seeks a writ of certiorari to resolve these important questions surrounding the coverage of the FDCPA and to resolve conflicts among the circuits:

- On the first question presented for review, the Seventh Circuit decision directly conflicts with decisions of the Second Circuit and the Fifth Circuit. *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996); *Bentley v. Great Lakes Collection Bureau, Inc.*, 6 F.3d 60 (2d Cir. 1993); *Taylor v. Perrin, Landry, deLaunday & Durand*, 103 F.3d 1232 (5th Cir. 1997).
- On the second question presented for review, the Seventh Circuit decision directly conflicts with the decision of this Court in *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995), and with decisions of the Second Circuit, the Eighth Circuit, the Ninth Circuit, and a previous decision of the Seventh Circuit. *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989); *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037 (8th Cir. 1984); *Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982); *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996).
- On the third question presented for review, the Seventh Circuit decision directly conflicts with decisions of the Second Circuit, the Eighth Circuit, and the Ninth Circuit. *Pipiles, supra*; *Hulshizer, supra*; *Baker, supra*.

ARGUMENT

I.

THE IMPOSITION OF AN INTENT REQUIREMENT ON AN FDCPA CLAIM DIRECTLY CONTRADICTS THE PLAIN LANGUAGE OF THE FDCPA AND THE DECISIONS OF OTHER CIRCUITS.

In its decision of August 26, 1997, a majority of a panel of the Seventh Circuit (Circuit Judges Manion and Kanne; Ripple, J. dissenting) held that intent is required for liability under the FDCPA. This holding creates a conflict with the Second and Fifth Circuits—indeed, every other court to have considered the matter has held that the FDCPA is a strict liability statute. *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996); *Bentley v. Great Lakes Collection Bureau, Inc.*, 6 F.3d 60, 63 (2d Cir. 1993); *Taylor v. Perrin, Landry, deLaunday & Durand*, 103 F.3d 1232, 1238 (5th Cir. 1997).[1] Except in the Seventh Circuit, FDCPA plaintiffs need prove neither intent nor negligence.

The Seventh Circuit has therefore imposed an unprecedented requirement that FDCPA plaintiffs show that

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[1] *Accord, Mateer v. Ross, Suchoff, Egert, Hankin, Maidenbaum & Mazel*, 1997 U.S. Dist. LEXIS 4517 (S.D.N.Y. April 10, 1997); *O'Connor v. Check Rite, Ltd.*, 973 F.Supp. 1010 (D.Colo. 1997); *Baez-Martinez v. PMS*, 1997 U.S. Dist. LEXIS 3314 (D.P.R. Feb. 6, 1997); *Stewart v. Slaughter*, 165 F.R.D. 696 (M.D.Ga. 1996); *Russey v. Rankin*, 911 F.Supp. 1449 (D.N.M. 1995); *Kuhn v. Account Control Technology*, 865 F.Supp. 1443 (D.Nev. 1994); *Belile v. Allied Medical Accounts Control Associated Bureaus (In re Belile)*, 209 B.R. 658 (Bankr.E.D.Pa. 1997); *Bingham v. Collection Bureau, Inc.*, 505 F.Supp. 864 (D.N.D. 1981); *Crawford v. Credit Collection Services*, 898 F.Supp. 699 (D.S.D. 1995); *Newman v. Checkrite Cal*, 912 F.Supp. 1354 (E.D.Cal. 1995).

debt collectors acted with intent to violate the Act. In so doing, the Seventh Circuit creates a serious conflict with other circuits and with the text of the FDCPA itself and severely weakens the protection that Congress intended the FDCPA to provide. The Seventh Circuit stated:

> Section 1692k of the Act provides for civil liability against a debt collector who *intentionally violates the Act*; such a collector is absolved if the violation was unintentional and procedures were in place to prevent it.

Jenkins, 124 F.3d at 828 (emphasis added).

In fact, the plain language of the FDCPA provides that civil liability exists for *any* debt collector who violates the FDCPA, regardless of intent. 15 U.S.C. §1692k. Intent is properly considered only with respect to the amount of statutory damages after liability is determined. 15 U.S.C. §1692k(b).

The Seventh Circuit conflated the presence of the bona fide error defense, codified at 15 U.S.C. §1692k(c), with a general requirement that an FDCPA plaintiff show intent. Such a requirement is not present in the FDCPA and stands in direct conflict with numerous other decisions.

The Seventh Circuit stated:

> If the FDCPA assigned liability for negligent behavior, Jenkins' case might survive. But far too many assumptions must be made before it would be reasonable to infer defendants actually knew, and then intentionally made a false representation as to the character of Jenkins' debt, as 15 U.S.C. §1692 requires. *Jenkins has failed to point to a genuine issue of material fact that defendants intentionally violated the FDCPA.*

Id. at 831 (emphasis added). The Seventh Circuit has distorted Ms. Jenkins' burden, and, in so doing, has subscribed to an unprecedented view of the FDCPA—one that neither Congress nor any other circuit has adopted.

When drafting the FDCPA, Congress chose *not* to impose an intent requirement that covered the entire Act. Instead, Congress applied individual intent or knowledge requirements to specific provisions of the FDCPA:

- 15 U.S.C. §§1692b(6) and 1692c(a)(2) provide that when a collector knows the consumer is represented by an attorney, the collector is prohibited from communicating with anyone other than the attorney.
- 15 U.S.C. §1692c(a)(1) prohibits a collector from communicating with a consumer at a time or place "known or which should be known to be inconvenient to the consumer."
- 15 U.S.C. §1692c(a)(3) prohibits communications with a consumer's place of employment if the collector "knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication."
- 15 U.S.C. §1692d(5) prohibits debt collectors from making repeated telephone calls to a debtor "with the intent to annoy."
- 15 U.S.C. §1692e(8) prohibits "[c]ommunicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed."

- 15 U.S.C. §1692j provides that those who "design, compile or furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of . . . a debt" are liable under the FDCPA.
- 15 U.S.C. §1692k(b) provides that in "determining the amount of liability . . . the court shall consider . . . the extent to which such noncompliance was intentional . . . ."

These specific provisions show that Congress chose to impose separate and specific knowledge and intent requirements on individual provisions of the FDCPA, rather than imposing the sort of comprehensive intent provision that the Seventh Circuit posits. As this Court emphasized in this very case, the plain meaning of a statute prevails. *Heintz*, 514 U.S. at 297-298.

Contrary to the Seventh Circuit's interpretation, a mere lack of intent to violate the FDCPA has never been sufficient to avoid liability. *Russell*, 74 F.3d at 33. The bona fide error defense, 15 U.S.C. §1692k(c), is a two-part defense that debt collectors may invoke *if* "the debt collector shows by a preponderance of the evidence that the violation was not intentional *and* resulted from a bona fide error notwithstanding the maintenance of such procedures reasonably adapted to avoid any such error" (emphasis added). The defense contains two parts, both of which a debt collector must show to avoid liability. *Mere lack of intent*, alone, is not enough, because the FDCPA is a strict liability statute. A debt collector lacking intent is nonetheless liable unless he or she can establish the second part of the defense.

Indeed, the "intentional" prong of §1692k(c) necessarily excludes intent as a general requirement of liability; otherwise, the provision would be superfluous. Furthermore, requiring "reasonable procedures" necessarily implies that *unintentional* acts give rise to liability. What is a "reasonable procedure" to avoid one's own *intentional* acts? Under the court's reading, §1692k(c) is nonsensical—only intentional acts give rise to liability, but there is a defense based on lack of intent.

The FDCPA was patterned after §5 of the Federal Trade Commission Act, 15 U.S.C. §45. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993). Under the FTC Act, there is no requirement of intent or negligence. *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); *Gimbel Bros., Inc. v. Federal Trade Com.*, 116 F.2d 578, 579 (2d Cir. 1941); *Helbros Watch Co. v. Federal Trade Com.*, 310 F.2d 868, 870 (D.C.Cir. 1962).

The Seventh Circuit's unprecedented dilution of the protection from unscrupulous debt collectors currently provided by the FDCPA is based on an incorrect interpretation of the Act.

II.

INTERPRETING THE BONA FIDE ERROR DEFENSE TO ELIMINATE DEBT COLLECTION ATTORNEYS' OBLIGATION TO EXERCISE LEGAL JUDGMENT CONFLICTS WITH CONGRESSIONAL INTENT, THE PRIOR DECISION OF THIS COURT, AND DECISIONS OF THE CIRCUIT COURTS.

The Seventh Circuit also held that the bona fide error provision of the FDCPA does not require collection attorneys to exercise legal judgment while collecting debts through litigation. This holding is inconsistent with

Congressional intent, this Court's decision in *Heintz*, *supra*, and previous decisions of the circuit courts, including the Seventh Circuit. *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989); *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037 (8th Cir. 1984); *Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982); *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996).

The Seventh Circuit's decision effectively grants collection attorneys much of the immunity under the FDCPA that they enjoyed *before* Congress repealed the attorney exemption in 1986. The court's holding permits attorneys who collect debts to capitalize on the power of their influence and authority as attorneys to collect money while allowing them to skirt liability for violations of the FDCPA by hiding behind the unverified claims of creditors.

Congress repealed the attorney exemption in the first place because Congress found that "bar associations have failed to fulfill their obligations underlying the premise of the attorney exemption." 99th Cong. 2nd Sess. (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1757. Congressman Annunzio stated on the floor of Congress:

> The staggering increase in recent years in installment and other credit sales has had a profound effect on that segment of the bar involved in collection work. The demand of volume threatens to destroy all vestiges of professionalism. The problem is too extensive to be remedied on a case-by-case basis.

131 Cong. Rec. H10535.

Under the Seventh Circuit's decision, attorneys are again free to use their status and power as attorneys for

the benefit of creditors without assuming the responsibilities that Congress sought to impose upon them when it repealed the attorney exemption and that this Court solidified in *Heintz*, *supra*. The Seventh Circuit accomplishes this remarkable change by construing the bona fide error defense, 15 U.S.C. §1692k(c), so broadly that it becomes all-encompassing. The Seventh Circuit holds that attorneys, who have at their disposal the tool of litigation, need not exercise legal judgment *when collecting debts during litigation.* The Seventh Circuit noted:

> [E]rrors in legal judgment are not an issue simply because the collectors are attorneys; nevertheless, there is no evidence that defendants exercised any legal judgment as to the validity of the force placed insurance charges.

Jenkins, 124 F.3d at 832.

Every other circuit to consider the issue has held that no debt collector is protected from mistakes of law by the bona fide error defense. *Pipiles, supra*; *Hulshizer, supra; Baker, supra*. Because even non-attorney debt collectors must be clear about the law before they contact consumers, it is indeed a strange result that the Seventh Circuit has decided to allow attorneys to blindly ignore the law as it relates to the underlying debt.

The Seventh Circuit gives attorneys who collect debts during litigation the right to refuse to use their capacity for legal judgment concerning the validity of the debt. Under the Seventh Circuit's decision, a creditor could add any sort of unauthorized amount to a debt, which the debt collecting attorney could then seek to collect without any inquiry. Such debt "padding" is a common debt collection abuse, and under the Seventh Circuit's decision, attorneys will once again be able to collect

padded debts with complete impunity, as long as they take pains to remain ignorant of the details.

Examples of debt padding abound. In *Strange v. Wexler*, 796 F.Supp. 1117 (N.D.Ill. 1992), an attorney debt collector added $300 in unauthorized attorney's fees to a debt. The court determined that Wexler was a debt collector, and it granted summary judgment for the plaintiff, holding that Wexler attempted to collect an amount that was not owed, notwithstanding Wexler's attempt to rely on a good-faith mistake defense. The court noted that "Wexler may have believed it was not in his interest to examine his cases carefully to determine whether he was entitled to attorney's fees from the debtor." *Id.* at 1120. Now, under the Seventh Circuit's decision, ignorance is bliss—if the attorney does not examine the contract and exercise "legal judgment" to determine that fees are not recoverable if the contract does not provide for them, then he or she has no liability.

Such a result also directly conflicts with the Seventh Circuit's holding in *Avila*, *supra*, in which the court discussed at length the responsibilities of attorneys who collect debts:

> An unsophisticated consumer, getting a letter from an "attorney," knows the price of poker has just gone up . . . . A letter from an attorney implies that a real lawyer, acting like a lawyer usually acts, directly controlled or supervised the process through which the letter was sent. That's the essence of the connotation that accompanies the title of "attorney" . . . . It is reasonable to believe that a dunning letter from an attorney threatening legal action will be more effective in collecting a debt than a letter from a collection agency. *The attorney letter implies that the at-*

> *torney has reached a considered, professional judgment that the debtor is delinquent and is a candidate for legal action.*

Id. at 229 (emphasis added). The Seventh Circuit went on to note that attorneys, who have been given special privileges by the state that *only attorneys can exercise*, should be held to a *higher standard than non-attorney debt collectors* when allowing dunning letters to be sent in their names. *Id.*

The Seventh Circuit has thus created two levels of culpability. Attorneys engaged in litigation are held to the strict standards of responsibility that correspond with their power and authority as custodians of the law. But attorneys who are engaged in litigation and are *also collecting debts* are *not* required to exercise legal judgment as to the validity of the debts, even if these same attorneys have been retained by the creditor to assess that validity.

As a result, when *Avila, supra* and *Jenkins, supra* are considered together, an attorney who sends debt collection letters must exercise legal judgment, but if the same attorney prepares and files a debt collection lawsuit, he or she may dispense altogether with legal judgment. Such a result is unintelligible. Under the Seventh Circuit's decision, an attorney must at one instant use his or her professional judgment concerning a debt, but at the next instant, he or she is somehow transformed into a debt collector and is no longer required to use that judgment, despite the fact that this same attorney continues to enjoy all the power and influence of his or her position with respect to the debtor. This ability to change hats from attorney to debt collector at will is exactly what Congress and this Court have labored to eliminate.

By way of explanation, the Seventh Circuit states that "[t]o require an attorney debt collector to conduct an independent investigation into the legal intricacies of the client's contract with the consumer would create a double standard for the bona fide error doctrine based upon the identity of the collector." *Jenkins*, 124 F.3d at 833-834. In his dissent to the Seventh Circuit's opinion, Judge Ripple criticized this result, stating:

> To hold that the FDCPA requires lawyers to meet the duties imposed upon them as attorneys does not discriminate against lawyers. It simply requires that lawyers use responsibly the special weapons that are entrusted to them. My colleagues portray the attorney/debt collector as a Janus-like entity who, in the course of collecting a single debt for his client, is sometimes attorney . . . and sometimes debt collector . . . . However, the Supreme Court has made it clear: He is a debt collector who, because of the special tools at his disposal, can violate the Act in especially potent ways.

Id. at 837-838.

Moreover, the bona fide error defense requires that a debt collector have in place procedures "reasonably adapted to avoid such error." 15 U.S.C. §1692k(c). Reasonable procedures for attorneys ought to differ from reasonable procedures for non-attorneys, because in most cases only attorneys have the power to institute lawsuits and bring the full force of legal process to bear upon debtors.

What is reasonable must depend on the facts of the particular situation. Congress indicated that it meant for courts to take into account the nature of the individual

debt collector's violation in 15 U.S.C. §1692k(b). It stated that "[i]n determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors . . . *the nature of such noncompliance, and the extent to which such noncompliance was intentional*" (emphasis added). Congress clearly indicated that the severity of a violation is to be judged by considering all the attendant circumstances. If the fact that a debt collector is an attorney who is engaged in litigation against a debtor is relevant to the *level* of culpability she or he possesses, then that fact should also be considered when determining whether the attorney-debt collector has taken reasonable steps to *avoid* non-compliance.

There is nothing unusual about making such a distinction. The training and expertise of the actor are always considered in determining what action is "reasonable" under the circumstances. The specialist is held to a higher standard than the general practitioner.

Under the Seventh Circuit's approach to the bona fide error defense, attorneys who attempt to collect debts by suing debtors need not exercise "legal judgment" to determine whether there is any basis for the amounts sought, no matter how obvious the lack of legal basis. As a result, attorneys have regained the exemption that Congress and this Court attempted to eliminate. Attorneys can once again file suit against debtors and attempt to collect unauthorized amounts with impunity, as long as the attorneys do not ask questions and institute measures to catch "clerical" errors like mistyped numbers or faulty arithmetic.

Such a scenario occurred in the case at bar. Respondents are attorneys who collect debts for NBD Bank. Ms.

Jenkins has shown that *these same attorneys* also advise NBD Bank as to the validity of the debts owed to NBD. However, these attorneys have been permitted to profess complete ignorance as to the amounts added to Ms. Jenkins' alleged debt to NBD. The Seventh Circuit even concedes that a reasonable attorney in the position of respondents would have understood that there was a problem ("[i]f the FDCPA assigned liability for negligent behavior, Ms. Jenkins' case might survive," *Id.* at 831); the dissent concluded that a jury could find actual knowledge.

By holding that respondents were not required to exercise legal judgment, the Seventh Circuit provides a road map for attorneys to evade liability under the FDCPA. In *Strange*, *supra*, the court held that an attorney debt collector was liable under the FDCPA for attempting to collect attorney's fees when no contract or statute authorized such fees. It is basic law in Illinois (and virtually all other states) that "[o]nly when explicitly provided by statute or by agreement is a prevailing party entitled to his opponent's payment of his attorney fees." *Helland v. Helland*, 573 N.E.2d 357, 359 (Ill.App. 1991). Under the Seventh Circuit's decision, an attorney can now avoid liability by (i) having the client state that an amount is properly due, and (ii) not reading the contract or considering the basis for seeking the amount—*i.e.*, remaining wilfully blind.

Such an outcome is not merely offensive to common sense but directly contravenes the purposes of the FDCPA, which explicitly states that debt collectors may not collect any amount "unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. §1692f(1).

The Seventh Circuit stated that Rule 11-type sanctions are sufficient to prevent the abuses at issue here, offering the observation that "[s]tate law sanctions (the equivalent of Fed.R.Civ.P. 11) apply to defendants in their capacity as lawyers." *Jenkins*, 124 F.3d at 834. However, when it repealed the attorney exemption to the FDCPA in 1986, Congress *expressly rejected* this argument, finding that "current law does not adequately protect consumers from attorney collection abuses." 99th Cong. 2nd Sess. (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1758.

The only decision to have endorsed such reasoning is *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993)—the case that created the conflict that led this Court to grant certiorari in the case at bar in 1994. The *Green* court stated that "we are unwilling to impose a system of strict liability [on attorneys] that conflicts with the current system of judicial regulation. We therefore hold that the actions of an attorney while conducting litigation are not covered by the FDCPA." *Id.* at 22. In its prior decision in this case, this Court rejected the argument that Rule 11 and similar provisions were sufficient, holding that attorneys conducting litigation were subject to the FDCPA.

Rule 11 sanctions are incapable of handling the problem of attorneys who file lawsuits for illegal debts. Most debt collection actions result in default judgments against unrepresented consumers who are unlikely to notice debt padding and are unlikely to know what to do about it if they do notice. In the rare cases in which consumers catch on, the collection attorney can simply withdraw the claim. Consumers are unlikely to know that Rule 11 or state sanctions exist and are even less likely to pursue them.

Debt padding for attorney debt collectors is essentially risk-free under the Seventh Circuit's decision, because the protection of the FDCPA does not apply. The Seventh Circuit has effectively reinstated the attorney exemption, using exactly the same argument that Congress and this Court have already rejected.

III.

CONGRESS DID NOT INTEND TO PERMIT DEBT COLLECTION ATTORNEYS TO INVOKE THE BONA FIDE ERROR DEFENSE FOR ERRORS OF LEGAL JUDGMENT.

The Seventh Circuit further held that the bona fide error defense in the FDCPA applies to *both* mistakes of law and simple clerical mistakes. *Jenkins*, 124 F.3d at 832 n. 7. By contrast, every other court has limited the bona fide error defense to clerical errors. *Baker*, 677 F.2d at 779 (Ninth Circuit held that evidence of mistake of law is insufficient to support bona fide error defense under the FDCPA, which allows only clerical mistakes to be defenses); *Pipiles*, 886 F.2d at 27 (Second Circuit held similarly); *Hulshizer*, 728 F.2d at 1038 (Eighth Circuit held similarly).[2]

The bona fide error defense in the Truth in Lending Act states:

> A creditor or assignee may not be held liable . . . if the creditor or assignee shows that the viola-

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[2] *Accord, Martinez v. Albuquerque Collection Servs.*, 867 F.Supp. 1495 (D.N.M. 1994); *Sibley v. Firstcollect, Inc.*, 913 F.Supp. 469 (M.D.La. 1995); *Bieber v. Associated Collection Servs.*, 631 F.Supp. 1410 (D.Kan. 1986).

> tion was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. §1640(c). This provision mirrors the FDCPA's bona fide error provision nearly *word for word*. From the outset, many courts (including the Seventh Circuit) interpreted the TILA provision to cover *only clerical errors*, not mistakes of law. *See, e.g., Haynes v. Logan Furniture Mart*, 503 F.2d 1161 (7th Cir. 1974); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976); *Ives v. W. T. Grant Co.*, 522 F.2d 749 (2d Cir. 1975). Furthermore, they construed "intentional" to mean an intent to perform the acts that violated TILA, not an intent to violate TILA. *Haynes*, *supra* (procedures designed to avoid violations must include internal controls); *Smith v. No. 2 Galesburg Crown Fin. Corp.*, 615 F.2d 407 (7th Cir. 1980).

Congress *codified* this interpretation and resolved a split among circuits by adding a sentence to the end of TILA's bona fide error provision that read: "[e]xamples of bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this title is not a bona fide error." 15 U.S.C. §1640(c). The FDCPA bona fide error provision does not contain this last sentence, because there had been no such litigation under the FDCPA bona fide error provision.

This addition to TILA's bona fide error provision merely codified the existing case law; in no way does it indicate that the TILA provision differs in scope or purpose

from the FDCPA provision, as the Seventh Circuit indicated. There is no reason to believe that Congress intended the FDCPA provision to be interpreted differently than the identical TILA provision. Congress merely affirmed this interpretation by adding an extra sentence to TILA. Far from denoting a vast *difference* between the two statutory provisions, this sequence of events serves only to strengthen their similarities. In short, there is no support for the Seventh Circuit's distinction between the TILA and the FDCPA bona fide error provisions in the legislative history or the case law.

It is undisputed that respondents had *no* procedures for reviewing the legal sufficiency of claims they made against consumers. As the Seventh Circuit recognized, "there is no evidence that defendants exercised any legal judgment . . . ." *Jenkins*, 124 F.3d at 832. Because the Seventh Circuit has taken a large step toward weakening the protection of the FDCPA based on ill-considered distinctions and has created conflicts among the circuits, the petitioner believes this Court should grant certiorari to resolve these issues and conflicts.

CONCLUSION

For all the reasons stated above, petitioner Darlene Jenkins respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-3410

DARLENE JENKINS,

Plaintiff-Appellant,

v.

GEORGE W. HEINTZ and BOWMAN,
HEINTZ, BOSCIA & MCPHEE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 1332—**George M. Marovich**, *Judge.*

ARGUED APRIL 10, 1997—DECIDED AUGUST 26, 1997

Before RIPPLE, MANION, and KANNE, *Circuit Judges.*

MANION, *Circuit Judge.* Darlene Jenkins bought a car. The sales contract required that she maintain certain insurance on it. According to the bank to which the sales contract was assigned, Jenkins failed to take out the proper insurance, so the bank took it out for her. Jenkins could not make all the payments on her car loan, and the defendants, who are collection lawyers, sued Jenkins in Illinois state court to recover the deficiency, including the insurance premiums. Jenkins countersued the collection lawyers in federal court under the Fair Debt Collection Practices Act, 15 U.S.C. § 1601 *et seq.* ("FDCPA"

or "the Act"), claiming that the insurance the bank procured was not authorized by the loan, and that the lawyers knew this when they attempted to collect the premiums, thereby violating the Act.

This case is before us a second time. The Supreme Court affirmed our first decision and determined that the FDCPA applies equally to debt collectors and lawyers engaged in consumer debt-collection litigation. The case is now before us to determine whether, by trying to collect the "force placed" insurance premiums, the defendants violated the Act. The district court granted the defendants summary judgment, concluding that Jenkins' evidence of defendants' knowledge and intent to violate the Act was insufficient to create an issue for trial. It also interpreted the Act's bona fide error provision and concluded that defendants' actions met the statutory requirements for a valid defense. We affirm.

I.

In July 1987 Darlene Jenkins signed a retail installment sales contract for the purchase of a car. The contract was assigned to what is now known as NBD Bank. She made only 35 of the 48 payments due, so the bank declared the loan in default and repossessed the car. The sale of the car did not cover the full amount of the debt. The bank retained the defendants' law firm to collect the deficiency, and it brought suit against her in Illinois state court on June 13, 1992 for the balance. Jenkins answered, filed affirmative defenses, and counterclaimed, contending that the balance due included unauthorized charges for force placed insurance. Insurance is force placed when a contract holder (here the bank) compels a borrower (an automobile purchaser) to maintain physical damage insurance and charges the premium to the borrower. On July 9, 1992, shortly after the state court

action was filed, defendant Heintz sent Jenkins' lawyer a settlement offer asking for $4,173 in premiums for this force placed insurance as well as $3,000 remaining on the principal balance of the loan (as well as some $1,000 in penalties).

Jenkins then sued attorney Heintz and his law firm for violating the Fair Debt Collection Practices Act by attempting to collect unauthorized amounts. Approximately half of the amount Heintz claimed in the letter that Jenkins owed consisted of the force placed insurance premiums. Jenkins complained especially about the lawyers' attempt to collect for the bank force placed "financial protection" insurance premiums, which covered the bank's expenses associated with the customer's default, such as repossession costs. Jenkins said that she never authorized such insurance, as evidenced by her copy of the loan agreement. She alleged that when Heintz included in his July 9, 1992 settlement letter a claim for force placed insurance premiums, he used "unfair or unconscionable means to collect or attempt to collect any debt" in violation of 15 U.S.C. § 1692f (which defines "unfair or unconscionable" to include adding amounts to a principal obligation not authorized by the agreement creating the debt or permitted by law), and falsely represented the character of her debt in violation of 15 U.S.C. § 1692e. Included among her allegations was a mention of the defendants' collection suit against her.[1]

In the previous round before the district court, the defendants moved to dismiss Jenkins' suit, arguing that attorneys who file suit to collect debts are not covered by the Act. The district court agreed and dismissed Jenkins' case. She appealed. This court reversed that decision,

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[1] In its entirety, that allegation reads: "21. One such collection action demanding payment for the unauthorized insurance was filed against plaintiff."

concluding that there was no longer an attorney exception to the FDCPA and that one would not be created by judicial fiat. 25 F.3d 536, 540 (7th Cir. 1994). The defendants petitioned for certiorari to the Supreme Court, which granted their request. 513 U.S. 959 (1994).

The Supreme Court affirmed this court's decision. 514 U.S. 291 (1995). The Court phrased the issue before it as "whether the term 'debt collector' in the [FDCPA] applies to a lawyer who 'regularly' *through litigation*, tries to collect consumer debts." *Id.* at 292 (emphasis in original). For two reasons, it found that the Act applied to lawyers engaged in consumer debt-collection. First, a lawyer who regularly attempts to obtain payment of consumer debts through legal proceedings meets the Act's definition of "debt collector": one "who regularly collects or attempts to collect, directly or indirectly, [consumer] debts owed . . . another." *Id.* at 294 (quoting 15 U.S.C. § 1692a(6)). Second, in 1986 Congress repealed an exemption from this Act for attorneys without creating a narrower, litigation-related exemption. *Id.* at 294-95. The Court concluded: "[W]e agree with the Seventh Circuit that the Act applies to attorneys who 'regularly' engage in consumer-debt collection activity, even when that activity consists of litigation." *Id.* at 299.

On remand to the district court, and after Jenkins amended her complaint for the second time,[2] the defendants moved for summary judgment contending that they did not know the nature of the unauthorized insurance coverage—including for financial protection—and simply collected amounts which the bank claimed were due. They also raised the bona fide error defense of the FDCPA, 15 U.S.C. § 1692k(c). Jenkins disputed de-

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[2] The district court denied Jenkins' motion for class certification without prejudice to resolve the substantive issues first.

fendants' claim of lack of knowledge and information, the parties engaged in discovery, and Jenkins responded to defendants' motion.

The district court granted summary judgment to the defendants, holding that Jenkins' evidence of defendants' knowledge was insufficient to create an issue for trial. The district court also held that defendants' procedures for preparing suits were reasonably adapted to avoid the error of which Jenkins complains, and thus that the FDCPA's bona fide error provision exempted defendants from liability. It reasoned that the Act does not require attorneys to make an independent investigation of the information their client provided, and that counsel was entitled to rely on the bank's representations that the charges were legally valid and authorized under Jenkins' contract.

The district court had jurisdiction over this dispute pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 1692k. We review the district court's grant of summary judgment pursuant to 28 U.S.C. § 1291, and do so *de novo*, drawing all reasonable inferences in the light most favorable to the nonmovant. *Bass v. Stolper, Koritzinsky, et al.*, 111 F.3d 1322, 1323-24 (7th Cir. 1997) (citations omitted). We are not required to "draw every *conceivable* inference [in the non-movant's favor], but only those that are reasonable." *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311, 312-13 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092 (1987) (emphasis in original). "Summary judgment is proper only if there is no genuine (in the sense of reasonably contestable) issue of material (that is, potentially outcome-determinative) fact. Fed. R. Civ. P. 56(c)." *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997).

II.

"The primary goal of the FDCPA is to protect consumers from abusive, deceptive, and unfair debt collection practices. . . . In the most general terms, the FDCPA prohibits a debt collector from using certain enumerated collection methods in its effort to collect a 'debt' from a consumer." *Bass*, 111 F.3d at 1324. Section 1692k of the Act provides for civil liability against a debt collector who intentionally violates the Act; such a collector is absolved if the violation was unintentional and procedures were in place to prevent it:

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. § 1692k(c). The defendants rested their summary judgment motion on this provision. Jenkins points to evidence in which she says the defendants knew they were collecting unauthorized insurance premiums; she asserts the district court erroneously decided this case as a matter of law despite a jury question about the defendants' knowledge and intent. She also argues that the district court misconstrued the bona fide error provision and misapplied it to defendants' actions.

We begin by noting one assumption. Whether or not the bank was authorized to or did force place financial protection insurance on the car Jenkins purchased is not at issue. For purposes of their motion, defendants did not contend that the force placed insurance was validly imposed under Jenkins' sales contract. Rather, they argued that even if some of the force placed insurance charges were unauthorized, they are not liable because

they never examined whether the bank obtained authorized or unauthorized charges. Thus, in our review of defendants' motion we will assume, without deciding, that the force placed insurance the bank procured was not authorized under Jenkins' sales contract.

A. Issue of Knowledge or Intent

The collection attorneys aver that they did not know what type of insurance the bank force placed on Jenkins' car. They do so primarily through the affidavit of Glen Vician, the law firm's chief executive officer. They say they were retained only to collect amounts the bank claimed were due, and that at no time did any of their attorneys, employees, or agents have any information or discussions with the bank concerning the nature or extent of the insurance coverage the bank obtained pursuant to its loan contracts. Jenkins asserts the defendants knew the insurance premiums they were collecting included unauthorized coverages, and thus that they intentionally violated the Act. Jenkins labels Vician's affidavits hearsay, contradicted by documents (unearthed through a protracted discovery battle) which she says demonstrate that the firm knew of the problems associated with force placed insurance. At least, Jenkins argues, this evidence raises a genuine issue of material fact entitling her to the jury trial she requested. The district court reviewed this evidence in detail, but concluded that it did not get Jenkins past summary judgment. We engage in the same examination.

1. December 5, 1990 opinion letter.

Jenkins asserts that the strongest evidence against the defendants is a 1990 opinion letter from attorney Thomas Burris of defendants' law firm to a vice president at the bank with the heading: "Requested Analysis

of Gainer Bank Policy of Force Placed Collateral Insurance on Consumer Loans." In this seven-page letter, the defendants provided the bank legal advice to "keep the collateral fully insured against loss or damage." The letter describes how force placed insurance works, and then discusses the provision of Indiana law under which force placed insurance is legal. It also treats the terms of the contracts between the bank and its borrowers (but not the terms and coverages of any insurance for which borrowers were allegedly improperly charged). Jenkins points out one portion of the letter:

> As a practical matter, over the past several years FPCI [force placed collateral insurance] has become a litigation hot spot. Today, we see more and more deficiency balances made up primarily of force placed premiums. We have also litigated a number of counterclaim matters which were based on the legality of FPCI provisions in consumer loan contracts. Too [sic] date, we have been successful on behalf of the lenders in enforcing such provisions, however, the current scrutiny given to the Mellon Bank situation offers us ample encouragement to review our current provisions and practices with regard to forced placing insurance.

Burris then suggests some drafting changes to the bank's standard form contract relating to force placed insurance, and proposes that a firm lawyer meet with a bank representative to coordinate those changes. The "Mellon Bank situation" referenced was a force placed insurance case which resulted in a publicized settlement.

To Jenkins, Burris' statement that force placed insurance was a "litigation hot spot," as well as his awareness that the *Mellon Bank* case had heightened scrutiny of banks' insurance practices, meant that defendants knew "of the problematic nature of the insurance." We have examined the letter line-by-line, and have drawn all

reasonable inferences in Jenkins' favor, but we cannot agree with her conclusion that the letter shows the defendants knew that some of the insurance coverage force placed upon Jenkins was unauthorized by her loan contract.

The opinion letter never addressed the type of force placed insurance policy to be purchased, or whether financial protection force placed insurance was authorized by the contract language. The "General Facts and Definitions" section of the letter defines force placed insurance as "comprehensive/collision insurance covering motor vehicles given to the bank as security on consumer loans"; both examples in the opinion letter assume that the type of insurance coverage that would be force placed would be standard collision insurance, coverage required by state law. No mention is made in the letter of a "financial protection" variant. The letter's purpose seems to have been to advise the bank how to improve its contract to make its force placed insurance program generally enforceable and more understandable to the consumer, not to advise the bank how to recover the unpaid insurance premiums about which Jenkins complains.

As the district court correctly determined, too many assumptions would be necessary to conclude from the letter that anyone in defendants' law firm knew that the bank's force placed insurer may have been improperly packaging financial protection coverage along with standard collateral protection insurance. At the least, a reasonable reader would need to be able to infer from the letter that Burris knew the bank's force placed insurance included coverage beyond collision insurance, or that the reference to the *Mellon Bank* case involved force placed insurance similar to the financial protection insurance at issue here. The lawyers knew that the bank force placed insurance generally—that is clear from the letter—but that is not enough to charge them with in-

tentional violation of the FDCPA for force placing other than authorized insurance. None of Burris' opinions or statements implicate the amounts charged for force placed insurance, the types of coverage for which the borrower is charged, or unauthorized placements of this coverage. The letter assumes the insurance is necessary and legal and advises how to improve the contract to make it enforceable and understandable.

2. Published articles regarding *Mellon Bank* case.

In 1989, borrowers from Mellon Bank on whose motor vehicles the bank force placed property insurance to protect its collateral interest in the vehicles filed a class action lawsuit against the bank.[3] The suit included policies issued by Balboa Insurance, which was NBD Bank's force placed insurer. The case was the subject of an article in the June 4, 1990 edition of *Business Week* magazine[4] and two articles in the May 1991 volume of *Business Lawyer*.[5] According to the *Business Week* article, one of the numerous allegations in the *Mellon Bank* case was that some of Mellon Bank's force placed collateral insurance coverage was not authorized by the language of the underlying loan contract. The *Business Lawyer* articles discussed the *Mellon Bank* case general-

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[3] *Baker v. Mellon Bank, N.A.*, No. 89-1326 (W.D. Pa., filed June 15, 1989).

[4] Michael Schroeder, "Mellon Bank May Wish It Never Got Into This Business," *Business Week* 112, 1990 WL 2004131.

[5] Barry A. Abbott and Helen Leslie, "Financial Institutions and Insurance in 1990: A Year of Accelerating Changes," 46 *Business Lawyer* 1275, 1285 (1991); Dwight Golann, "Beyond Truth In Lending: The Duty of Affirmative Disclosure," 46 *Business Lawyer* 1307, 1317 (1991).

ly. Jenkins contends that because the defendants' law library subscribed to these magazines during this time frame, the collection attorneys must have known about the *Mellon Bank* case, and therefore that they should have known that the bank's financial protection force placed insurance policies were unauthorized under the sales contract.

Jenkins' claims of inferential knowledge from these articles is too speculative. None of the attorneys testified that they had read any of these articles, and Jenkins has proffered no evidence (for example, in the form of an admission at a deposition) to the contrary. Even if we assume that the defendants had read the articles, it does not establish that they knew that the way NBD Bank operated its force placed insurance program was unauthorized by the loan contracts. After all, some forms of force placed insurance are not only legal but often necessary. And although Balboa was the force placed insurer at issue in both cases, Jenkins has not shown the same policies were issued. Nor has Jenkins shown that defendants knew that the bank's contracts were the same or even similar to Mellon Bank's. Jenkins has not presented evidence that defendants knew the details of the *Mellon Bank* case and could or did know therefrom that NBD Bank's policies were unauthorized.

3. Other documents.

As evidence of defendants' intent, Jenkins also offers several documents that refer to the costs of "skip tracing" and repossession for which the bank was allegedly reimbursed pursuant to force placed insurance policies; documents in which, when consumers questioned force placed insurance amounts, defendants told them that the charges were due and owing; and documents which indicated that defendants continued to collect on these

amounts even after this lawsuit raised doubt about the authority to collect these charges. From these records, Jenkins argues that defendants "must have known" that the force placed insurance covered more than mere collision or property loss.

Jenkins' argument is premised upon inferences from information largely not in defendants' possession. The Bates stamp numbers on these documents indicate that for the most part, the bank produced these documents, not the defendants. Jenkins has not offered evidence that the defendants did anything to help recover those reimbursements, or knew of or responded to those consumers' questions. There are many references in defendants' files (as well as in the bank's files) to the collection of force placed insurance, some of which was obviously legal and necessary. But there is no reference in a document generated by the defendants to the collection of premiums for force placed financial protection insurance. Therefore, it is not reasonable to conclude that the defendants intentionally attempted to collect an amount not authorized by the contract between Jenkins and the bank.

4. Vician affidavit.

Jenkins also attacks the evidence the defendants offered that its allegedly improper collection efforts were unintentional, primarily through challenging the affidavit of Glen Vician, the head of defendants' law firm. This affidavit stated that no one within the firm:

> had any information of any kind or character relating to the nature or extent of coverages in place with the insurance carrier or carriers providing collateral protection insurance or forced placed insurance on behalf of Gainer Bank/NBD, its predecessor banks, and/or including any coverages on the customers of Gainer/NBD or its predecessor banks and customers.

Vician made this statement "upon personal knowledge and/or the business records of the firm." Jenkins labels the affidavit hearsay because it repeatedly refers to the collective knowledge of the firm. Jenkins argues that Vician may not testify to the knowledge of other members in his firm without personal knowledge of each member's state of mind.

Although Jenkins is correct that Vician cannot testify to the knowledge of another of his firm's members, *see Price v. Rochford*, 947 F.2d 829, 832 (7th Cir. 1991), he can and has permissibly made statements under oath concerning the firm's numerous business records, as well as his own knowledge as a firm partner who dealt chiefly with the bank. (We do not see the district court to have read the affidavit for more than that.) The defendants also included numerous other documents and deposition transcripts which supported Vician's conclusion. The other partners in the firm who dealt with the bank—Gerald Bowman, George Heintz, and Deborah McPhee—each testified in detail they did not know of any litigation or governmental investigations relating to a financial protection variant of force placed insurance.

Jenkins' challenge does not take into account basic summary judgment methodology. Once the defendants offered evidence—through the testimony of law firm members and organizational records—that they did not know the bank may have been bundling financial protection coverage with the force placed collateral insurance, and thus could not have intentionally collected such unauthorized premiums, the burden shifted to Jenkins to move beyond the pleadings and to set forth specific facts from which it might reasonably be inferred that the defendants did in fact know of the bank's allegedly improper practices. *Becker v. Tenenbaum-Hill Associates, Inc.*, 914 F.2d 107, 110 (7th Cir. 1990) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Co.*, 475 U.S.

574, 586-87 (1986)). Jenkins has not done so. Viewing the evidence in the light most favorable to Jenkins, we can only conjecture that defendants knew the nature of the force placed insurance. But this is insufficient to deny a summary judgment motion. *See Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1127 (7th Cir. 1996) ("Speculation is insufficient to withstand summary judgment. . . ."). Jenkins is required to present evidence creating a reasonable inference, not a mere possibility.

Jenkins' argument boils down to an assertion that given the information she uncovered in discovery—the Burris opinion letter, the articles in defendants' law library, the bank's delinquent loan files—the defendants should have known that the bank was force placing unauthorized coverage. If the FDCPA assigned liability for negligent behavior, Jenkins' case might survive. But far too many assumptions must be made before it would be reasonable to infer defendants actually knew, and then intentionally made a false representation as to the character of Jenkins' debt, as 15 U.S.C. § 1692 requires. Jenkins has failed to point to a genuine issue of material fact that defendants intentionally violated the FDCPA.

B. Bona Fide Error Defense

Jenkins also claims that the district court misinterpreted and misapplied the bona fide error provision of the FDCPA, 15 U.S.C. § 1692k(c), and thus that defendants should not be permitted to invoke it.[6]

1. Statutory interpretation.

Jenkins contends that the bona fide error provision cannot be interpreted to cover errors of legal judgment

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[6] *See supra* p. 6 for the text of 15 U.S.C. § 1692k(c).

by attorney debt collectors. She would limit the provision to clerical mistakes and other such ministerial errors, not one of legal judgment, as she alleged occurred here. Even if defendants did not act intentionally, she argues that the alleged violation constitutes a legal error for which § 1692k(c) provides no protection,[7] at least not for attorney debt collectors.

As noted below, errors in legal judgment are not an issue simply because the collectors are attorneys; nevertheless, there is no evidence that defendants exercised any legal judgment as to the validity of the force placed insurance charges. They were methodically processing a collection for a client's delinquent account. The evidence demonstrates that the defendants attempted to collect a charge for force placed insurance, not knowing that the charge included a financial protection component. Even if it were an issue, this does not show an error in legal judgment.

Even if there was evidence that these collection attorneys exercised legal judgment as to the validity of the force placed insurance charges, Jenkins' argument—that a legal (rather than clerical or factual) error vitiates the bona fide error defense—presumes that an attorney debt collector has an independent duty to assess the legality of the debt sought to be collected. To Jenkins, "[a]ttorney

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[7] Jenkins also analogizes the provision to a similar section in the Truth In Lending Act ("TILA"), 15 U.S.C. § 1640(c), which is limited to clerical mistakes and which does not include errors of judgment or law. But as the district court noted, the TILA bona fide error provision expressly defined bona fide errors as "clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error." 15 U.S.C. § 1640(c). The FDCPA provision does no such thing. This, along with the statutes' different purposes, distinguishes the two.

debt collectors have a duty to ensure that the amounts being collected are legally valid and authorized by contract"; "[d]etermining whether an item is a legally valid charge prior to filing suit for that amount is a task which attorneys must undertake . . . ." According to Jenkins' oral argument, defendants should have more deeply investigated the charges for the force placed insurance because the defendants are lawyers who sued her approximately one month before sending to her attorney the settlement letter complained of in her FDCPA complaint.

The text of the settlement letter indicates that the defendants acted in their capacity as debt collectors instead of as lawyers. By law (15 U.S.C. § 1692c(a)(2)), the collector must communicate with the consumer's attorney. Nevertheless, the letter to Jenkins' attorney seeks to "amicably resolve this matter" and lists documents enclosed in support of the bank's position that Jenkins had to insure the vehicle but did not, defaulted on her contract, and owed a certain amount of money. The letter concludes on a conciliatory note hoping "to reach some type of amicable practical resolution." The letter—the centerpiece of Jenkins' claim—has nothing lawyerly about it (except, of course, its letterhead). A collection agency could just as easily have written this attempt to settle the account. A debt collector should be able to negotiate a settlement even after a lawsuit is filed. Debt collection letters sent by lawyers on firm letterhead, albeit pre-suit, containing much harsher language than at issue here have been found not to violate the FDCPA. *See Terran v. Kaplan*, 109 F.3d 1428, 1430 (9th Cir. 1997) (one-page letter typed on law office letterhead stating "[u]nless an immediate telephone call is made to . . . a collection assistant in our office . . . we may find it necessary to recommend to our client that they proceed with legal action" did not threaten or

encourage the least sophisticated debtor to waive his statutory right to challenge the validity of the debt, and thus did not violate the FDCPA).

As for the sequence of filing the lawsuit then sending the settlement letter, we note that the second amended complaint showcases the letter as the demand for payment of an unauthorized amount, and grants the defendants' suit against Jenkins only a single sentence, failing to give its filing date or any particulars.[8] A fair reading of Jenkins' complaint is as a suit about the settlement letter—debt collecting—rather than about the state court collection action defendants filed—legal activity.

Along with these factual hurdles, Jenkins' argument ignores that Congress in the FDCPA and the Supreme Court in its opinion in this case placed lawyers and lay debt collectors on equal footing. While a letter sent by an attorney after a lawsuit is filed arguably presupposes that the attorney-collector has put on a new hat and is now a litigator, not a collector, the Act still defines him as a collector, and the Supreme Court has confined the litigator to the standards of a collector. Filing a lawsuit does not insulate a lawyer from the restrictions of the Act, nor does it expose him to standards under the Act not applied to non-lawyer collectors. Rule 11 violations and other such claims must be pursued outside the Act.

The FDCPA, as with all statutes, must be considered as a whole. *Beecham v. United States*, 511 U.S. 368, 372 (1994) ("[W]e seek to discern [ ] the plain meaning of the whole statute, not of isolated sentences."). Pursuant to Jenkins' reading, the Act would limit a debt collector to only collecting legally valid claims. But under this interpretation, there could not be a bona fide error for attempting to collect a claim not legally authorized by

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[8] *See supra* note 2.

the contract with the debtor. So the bona fide error defense would be read out of the statute with respect to the violations of 15 U.S.C. §§ 1692e and 1692f alleged by Jenkins. It is an "elementary canon of construction that a statute should not be interpreted so as not to render one part inoperative." *Department of Revenue of Oregon v. ACF Industries*, 510 U.S. 332, 340-41 (1994) (quoting *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)).

Moreover, the Supreme Court in its previous opinion in this case read the FDCPA to bind attorneys who regularly engage in consumer debt collection "even when that activity consists of litigation." In the appeal to the Supreme Court, the defendant-attorneys requested a dispensation from the Act because they were litigating, not collecting. The Court inserted the "even when" phrase to underscore that collectors who litigate are still collectors subject to the Act. The irony should not be lost here that Jenkins successfully argued to the Supreme Court that attorneys and debt collectors should be treated the same under the Act, but she now advances that attorneys should be held to a separate, perhaps higher standard.

Filing suit, as defendants did here, should not give lawyers dispensation from the FDCPA; the law still applies to them. And it does not hold them to a different standard. The Act reads that debt collectors are not liable for attempting to collect validly certified amounts owed their client. It does not say that the collector's status as an attorney should add a requirement of independent legal analysis for each aspect of the creditor's claim, including a potential defense arising out of a somewhat arcane subject matter like force placed insurance. To require an attorney debt collector to conduct an independent investigation into the legal intricacies of the client's contract with the consumer would create a double standard for the bona fide error doctrine based

upon the identity of the collector. The language of the FDCPA does not provide for such a standard, and pursuant to the reasoning of our last opinion, 25 F.3d at 539-40, we will not impress such an understanding upon it. To interpret the FDCPA as not to treat lawyers and debt collectors equally would contort the statute's meaning, and ignore Congress' drafting and the Supreme Court's interpretation. In *Heintz,* the Court stated:

> The Act says explicitly that a "debt collector" may not be held liable if he "shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error." § 1692k(c). Thus, even if we were to assume that the suggested reading of § 1692c(5) is correct [harmfully anomalous results to litigating activities], we would not find the result so absurd as to warrant implying an exemption for litigating lawyers.

514 U.S. at 295. ". . . Congress intended that lawyers be subject to the Act whenever they meet the general 'debt collector' definition." *Id.* Lawyers meet the definition of debt collectors, even while litigating; thus the same standards apply to "attorney debt collectors" as apply to other debt collectors.

There is no stated exclusivity in the FDCPA as the means to redress collections errors. State law sanctions (the equivalent of Fed. R. Civ. P. 11) apply to defendants in their capacity as lawyers, and do so jointly with the Act. Those provisions preserve Jenkins' ability to seek redress for any errors in how defendants acted *qua* lawyers. *See, e.g., Terran v. Kaplan,* 109 F.3d at 1434.

2. Statutory application.

Jenkins also claims that the bona fide error defense has been misapplied in this case because the defendants failed to meet the preponderance of the evidence burden. To rely on bank employees to verify the nature of the force placed insurance coverage was not reasonable, she contends. Jenkins argues that the procedures the defendants' firm had in place are not reasonably adapted to prevent the particular error, as the statute requires, and therefore the collectors are liable for the violation.

The defendants have offered unrebutted evidence of the procedures they followed when preparing to file suit to collect a debt to avoid errors and omissions that could result in an FDCPA violation. These include the publication of an in-house fair debt compliance manual, updated regularly and supplied to each firm employee; training seminars for firm employees collecting consumer debts; and an eight-step, highly detailed pre-litigation review process to ensure accuracy and to review the work of firm employees to avoid violating the Act. After suit is filed, the firm assigns an attorney to review all issues relating to a particular deficiency, and stops all collection efforts on a disputed balance before judgment to verify all disputed items with the client.

Jenkins does not dispute that the defendants performed each of these procedures. Instead, she sets the bar much higher. She would require debt collectors to investigate the charge for which recovery is sought; to "routinely investigate and evaluate the legal liability of the debtor for charges imposed by [defendants'] clients . . . ." But for the same reasons discussed above in II.B.1, we do not adopt such a construction of the FDCPA.

Section 1692k(c) requires that the debt collector show by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error

notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. The district court correctly concluded that defendants' elaborate procedures meet this standard to avoid collecting unauthorized charges. They go so far as to insist that their client verify under oath that each of the charges was true and correct. Where defendants maintain extensive systems designed to prevent errors, an unintentional violation of the Act will not result in liability. *Dutton v. Wolhar*, 809 F. Supp. 1130, 1138 (D. Del. 1982). Defendants have satisfied their burden to prove this affirmative defense.

III.

Jenkins did not present evidence from which a jury could reasonably conclude that the defendants knew of the unauthorized nature of the force placed insurance and intentionally falsely represented the character of Jenkins' debt. Nor given the letter of the FDCPA and the Supreme Court's opinion in this case will we hold the collection attorneys in this case to a separate standard than other debt collectors. The bona fide error provision, 15 U.S.C. § 1692k(c), applies to Jenkins' claim. For these reasons, the grant of summary judgment to the defendants is

AFFIRMED.

RIPPLE, *Circuit Judge*, dissenting. I respectfully part company from my colleagues because, in my view, the majority opinion effectively contradicts both our own precedent and that of the Supreme Court of the United States. Indeed, the Supreme Court, in this very case, held that lawyers who regularly collect debts through the

use of litigation are subject to the requirements of the FDCPA. Today, the majority goes a long way toward creating the very exemption for lawyers under the FDCPA that the Supreme Court, and this court in its earlier opinion, rejected. I also cannot agree with the majority's assessment of the record or its view of the applicability of the bona fide error defense.

Under the terms of the Act, a debt collector is not liable if the debt collector is able to show by a preponderance of the evidence that "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k. Because the statute places the burden on the debt collector to establish this exemption, the debt collector—not the debtor as the majority appears to suppose—also has that burden on summary judgment.

1.

I first turn to the issue of whether the debt collector has established that it did not know of the client's improper practices.

The majority, assuming that Mrs. Jenkins has the burden on the matter, holds that Mrs. Jenkins has not "set forth specific facts from which it might reasonably be inferred that the defendants did in fact know of the bank's allegedly improper practices." *Ante*, at 13. Respectfully, I must disagree both with respect to the majority's shifting of the burden and with respect to the substance of the evidence.

The majority assesses the record by examining each evidentiary submission in vacuo and declaring that, standing alone, it is not sufficient to support a verdict in favor of Mrs. Jenkins. However, the evidence must be assessed not as if each submission existed in isolation,

but in its totality. When assessed appropriately, the evidence would allow a jury to conclude that the defendants' alleged error was not unintentional. For example, in Burris' opinion letter to Gainer Bank, Burris provides the defendants' "legal analysis and formal opinion . . . concerning Gainer Bank[']s current practice and use of 'Forced Placed Collateral Insurance' in the Consumer Loan contexts." R.107, Ex.3 at 1. From this language, a jury could reasonably infer that Mr. Burris was familiar with and knew the bank's "current practice and use" of FPCI. It would be quite unusual for an attorney to render a legal opinion on the bank's use of FPCI without knowing the nature of that practice and without examining the bank's contract with its FPCI insurer.

Further, in Burris' letter, he warns the bank that, in light of the "Mellon Bank situation," he and the bank should review the current provisions of its consumer loan contracts *and* its "practices with regard to forced placing insurance." *Id.* at 2. Again, it would be very strange for Burris to refer to the Mellon Bank situation in an opinion letter without at least a basic understanding of what that matter involved and how it was related to his client's situation. Indeed, Burris' use of this short-hand designation, the Mellon Bank situation, makes little sense unless both Burris and Stewart, the addressee of Burris' letter, already knew the nature of that litigation. Certainly, if his client did not know, one would expect that a lawyer would have elaborated further, especially with respect to the numerous allegations in the Mellon Bank complaint (many of which are similar to Mrs. Jenkins' allegations). Without such an explanation, Burris hardly could have expected the bank to determine whether a further review of its practices was warranted. Even if Stewart were ignorant of the Mellon Bank litigation, a jury could certainly infer from this letter that the letter evinced Burris' own knowledge of the

Mellon Bank situation and its implications for Gainer Bank. In short, this letter hardly establishes the debt collector's burden of proof on the issue of whether the violation was unintentional.

The majority also rejects precipitously the possibility that the other documents in the record, when assessed in light of the letter, support the conclusion that the law firm was aware that the bank adds unwarranted costs to a customer's loan balance. The majority disparages the relevance of these documents because they require inferences from information that was not in the defendants' possession. Referring to the Bates stamp numbers, my colleagues denigrate the significance of these documents because "for the most part, the bank produced these documents." *Ante*, at 12. Although many of the documents were produced by the bank, a number of the documents bear the defendants' Bates stamp marking; at least five documents attached to Mrs. Jenkins' response to the defendants' motion for summary judgement bear the "BHBM" (defendants') Bates stamp and make reference to an insurance claim by the bank for reimbursement of repossession fees or skip claims. One document states explicitly that a "skip claim [was] pending via Garden City Ins[urance]." R.107, Ex.9 at BHBM00096. Another document refers to an insurance skip payment that the bank received and that was credited toward the customer's outstanding balance.

These documents produced from the defendants' own files, coupled with Burris' opinion letter, would permit a jury to infer that the defendants knew of the additional insurance that was purchased to cover "skip claims." I therefore cannot join in the panel's decision to deprive Mrs. Jenkins of her day in court on the issue of whether the defendants have demonstrated, as a matter of law, that the error was unintentional.

2.

Even assuming that the defendants demonstrated as a matter of law that their error was unintentional, to escape liability they also must show that the violation "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k. Here again the defendant debt collectors hardly establish that they are entitled to judgment as a matter of law with respect to this aspect of their defense. They simply have not established a bona fide error defense.

As the majority notes, the defendants have in place a detailed pre-litigation procedure to avoid some types of errors. These procedures are designed to combat problems of transposing numbers and similar problems. But that is not the kind of error at issue here. The alleged violation here is that the defendants brought suit for amounts not authorized by the insurance contract; by including these amounts within the complaint, the defendants violated the Act. On this record, there is no showing that the defendant debt collectors had in place a system designed to catch this sort of error. Thus, the bona fide error defense has not been established as a factual matter.

3.

I have, however, a more fundamental disagreement with the majority's view of the bona fide error defense. I cannot agree with its conclusion that the defendants can escape the strictures of the Act because their activities were those of debt collectors, not lawyers. The record makes clear that the defendants were engaged in collecting a debt for their client through the practice of law. It is not disputed that they were using devices that the law only permits lawyers to use to collect the debt.

They had commenced a lawsuit on behalf of their clients. On the letterhead of the law firm, they had sent a letter in an attempt to obtain payment. My colleagues write that "[t]he letter—the centerpiece of Jenkins' claim—has nothing lawyerly about it (except, of course, its letterhead)." *Ante*, at 16. The concession is no mean matter. *See Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996) ("An unsophisticated consumer, getting a letter from an 'attorney,' knows the price of poker has just gone up.").

More importantly, the letter itself will not bear the majority's characterization that it is the letter of a debt collector, not a lawyer, and that therefore its writer cannot be held liable for legal errors. The Supreme Court has precluded this conclusion. Justice Breyer's opinion in this case for a unanimous Court held that lawyers were not exempt from the Act. He relied in part on the letter in question: "As part of an *effort to settle the suit*, a lawyer with [defendants'] law firm, George Heintz, wrote to Jenkins' lawyer." *Heintz v. Jenkins*, 514 U.S. 291, 293 (1995) (emphasis added). Thus, the Court's opinion is premised on the point that this court now negates. Heintz was engaged in "lawyerly" conduct; settling lawsuits is something lawyers do every day.

Further, the letter itself makes clear that this was a settlement overture between two lawyers trying to resolve the suit. The letter was sent on defendants' firm letterhead to Mrs. Jenkins' lawyer. In the letter, Heintz states that the letter is "an attempt to amicably resolve this matter." R.49, App.A at 1. From the context of the letter, however, the phrase "this matter" refers not simply to the underlying debt, as the majority appears to assume, but to the underlying lawsuit. Indeed, just above the attorney/addressee's name, the letter indicates that the communication was sent regarding "Gainer Bank vs. Darlene Jenkins[,] 89M1-147179." *Id.* Although defendants' ultimate goal may have been to resolve the

underlying debt issue, this letter involved a case settlement negotiation between two adversary lawyers. *See Avila*, 84 F.3d at 229 ("A letter from an attorney implies that a real lawyer, acting like a lawyer usually acts, directly controlled or supervised the process through which the letter was sent.").

The majority's characterization of the defendants' activities is not a simple misjudgment of the facts of the case. At bottom, the majority misinterprets the bona fide error defense under the FDCPA and seriously undermines the Supreme Court's decision in this case. In the majority's view, even when a lawyer uses those tools reserved exclusively for those who have a license to practice law, the lawyer is liable under the Act only for the same sorts of misfeasance as a non-lawyer. The majority suggests that, if a lawyer/debt collector has breached his duty as a lawyer, Rule 11 sanctions (or the equivalent state law remedy) may be appropriate, but a civil penalty under the FDCPA is not.* Only in this way, suggests the majority, are lawyers treated the same as other debt collectors under the Act. Requiring a lawyer to fulfill the duty imposed by Rule 11 (or an equivalent state provision), in the majority's view, holds lawyers to a higher standard than the Act requires.

I cannot agree. Lawyer/debt collectors collect debts in a manner distinctly different from the means available

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* The majority rejects Mrs. Jenkins' interpretation of the statute because, says the majority, it would vitiate the bona fide error defense for a lawyer's attempts to collect an amount that, as it turns out, is not legally authorized by the contract. I do not see how this naturally follows. Lawyers/debt collectors would have the same protection from the bona fide error defense as anyone else. If the lawyer has in place a set of procedures reasonably adapted to avoid the type of error alleged—attempting to collect legally unauthorized amounts through litigation—the defense is available.

to others. Lawyers can bring lawsuits on behalf of their clients; only lawyers can utilize in this special way the legal machinery of the sovereign. To hold that the FDCPA requires lawyers to meet the duties imposed upon them as attorneys does not discriminate against lawyers. It simply requires that lawyers use responsibly the special weapons that are entrusted to them. My colleagues portray the attorney/debt collector as a Janus-like entity who, in the course of collecting a single debt for his client, is sometimes attorney engaged in debt collection and sometimes debt collector engaged in debt collection. However, the Supreme Court has made it clear: He is a debt collector who, because of the special tools at his disposal, can violate the Act in especially potent ways.

As the Supreme Court noted, the Congress focused explicitly on lawyers during its consideration of the legislation and determined that they ought to be held liable for sanctions under the Act. Congress' explicit attention to the role that lawyers play in debt collection renders too facile the majority's suggestion that only judicial sanctions can be used to remedy any violations of a lawyer's duty in or out of the courtroom and that the FDCPA provides remedies only for violations that every debt collector can commit. Sanctions are designed to ensure the fair and efficient conduct of litigation in the courts. The purpose of the FDCPA is quite different: It is "to protect consumers from abusive, deceptive, and unfair debt collection practices." *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324 (7th Cir. 1997). To say that judicially-imposed sanctions are sufficient to vindicate Congress' interest in preventing abusive, deceptive or unfair debt practices when that practice is litigation is to undercut the intent of Congress in enacting the legislation and to render lawyers immune from accountability for the very special sort of

damage they alone are able to do to the individual consumer and to the economy. The Supreme Court earlier ruled in this case that lawyers are subject to the strictures of the FDCPA. By holding that the sole remedy for attorney abuses in debt collection actions is judicial sanctions, the majority today gives the defendants much of what the Supreme Court and Congress refused to provide: a litigation exception to the FDCPA. According to the majority, no matter how much damage their abusive lawyering works on the sector of the economy protected by the Act, lawyers have no duty under the FDCPA. Although they can bring to bear one of the most powerful tools in debt collection—the ability to engage in litigation to collect debts (something that no other type of debt collector can do)—, they are immune from the accountability required of everyone else. This view is contrary to the Supreme Court decision in *Jenkins* and to *Avila*, 84 F.3d at 229 (noting that a letter from an attorney with the "attorney's signature implies the attorney has formed a professional judgment about the debtor's case"). In my view, the defendants were required to exercise their professional judgment as attorneys before commencing litigation and sending a letter to Mrs. Jenkins or her attorney on law-firm letterhead.

I respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 26, 1997

BEFORE:

Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable DANIEL A. MANION, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

No. 96-3410

DARLENE JENKINS,

Plaintiff-Appellant,

v.

GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & MCPHEE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
93 C 1332—George M. Marovich, Judge.

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

[Dated September 16, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DIVISION OF ILLINOIS
EASTERN DIVISION

DARLENE JENKINS,	)	
	)	
Plaintiff,	)	No. 93 C 1332
v.	)	
	)	
	)	
	)	Judge
GEORGE HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE,	)	George M. Marovich
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Darlene Jenkins ("Jenkins") brought this action against Defendants George Heintz ("Heintz") and his law firm, Bowman, Heintz, Boscia & McPhee ("Bowman Firm") alleging that Heintz and the Bowman Firm violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692. Defendants now move for summary judgment, claiming that any alleged violation of the act was the product of a bona fide error as defined by the FDCPA. For the following reasons, the Court grants the motion.

I. BACKGROUND

Defendant Heintz is an attorney and a partner in the Bowman Firm. Gainer Bank (later NBD Bank) is a client of the Bowman Firm and has a large number of customers, including Darlene Jenkins, who signed retail installment contracts for the purchase of motor vehicles.

Jenkins' loan contract with Gainer Bank provides, among other things, that she, the buyer, must insure the vehicle against loss or damage. The contract also provides that if she fails to do so, the Bank can purchase the necessary insurance to cover the vehicle and add the premium amount to Jenkins' loan amount. The pertinent language provides:

> That if the Buyer does not . . . keep [the collateral] insured . . . the Creditor can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect.

Jenkins failed to make the installments due under the contract and to maintain insurance on the vehicle. Based on this failure, NBD exercised its rights under this contract provision and "forced placed" insurance on the car, by purchasing a so called forced placed collateral insurance ("FPCI") policy from Balboa Insurance Company.

The car was repossessed and Jenkins' file was sent to the Bowman Firm for collection on March 12, 1991. The file contained the following:

a. Credit application dated July 24, 1987, executed by Darlene Jenkins;

b. Retail installment contract dated July 24, 1987, executed by Darlene Jenkins;

c. Installment loan history inquiry dated February 21, 1990;

d. Installment loan account inquiry dated March 14, 1990;

e. Letter to Schepel Buick of Merrillville, Indiana, dated September 26, 1990, by Gainer Bank re-

questing refund of credit, life, accident and health insurance on Darlene Jenkins' account;

f. Requisition for expense check to Automobile Recovery Bureau dated October 22, 1990, and invoice of Automobile Recovery Bureau dated October 16, 1990;

g. NSF check from Darlene Jenkins to Gainer Bank dated October 23, 1988 in the sum of $236.71;

h. NSF check from Darlene Jenkins to Gainer Bank dated July 10, 1989, in the sum of $236.71;

i. NSF check from Darlene Jenkins to Gainer Bank dated November 22, 1989, in the sum of $236.71;

j. NSF check from Darlene Jenkins to Gainer Bank dated March 30, 1990 in the sum of $236.71; and

k. Transmittal cover sheet with account balance information from Gainer/NBD Bank to Bowman, Heintz, Boscia & McPhee, P.C.

After a review of these materials, the Bowman Firm prepared a complaint, summons, and verification statement for the purpose of filing a lawsuit against Jenkins.

The Bowman Firm then forwarded a copy of the proposed complaint to Joe Laudani, the Assistant Vice President of NBD, asking him to verify that the complaint was accurate as to balances due, and, if so, to execute a sworn statement verifying the validity of the balance. After Laudani returned the executed verification, Bowman filed the complaint in the Circuit Court of Cook County on June 13, 1991.[1]

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[1] Defendants claim, and Jenkins does not dispute, that they maintain a certain set of procedures to insure accuracy and compliance with the FDCPA. These procedures include publication of an "in-house" fair debt compliance manual, training

(continued...)

[1] (...continued)

seminars to advise staff with information to insure compliance with the FDCPA, and an eight-step review process for new consumer loan accounts that are transmitted to the firm. The eight-step pre-suit review process includes the following:

a. Bowman sends a special transmittal letter to each client for new file information. The form is filled out by the client to insure accuracy of the collection file.

b. The consumer loan files are transmitted to the Data Operations Department at Bowman. Specially trained clerks in Data Operations review the consumer debt accounts and input the information into Bowman's computer system.

c. The file is then transferred to the Paralegal Department for initial review of the account information on the Bowman computer. The paralegal reading the file is trained by the law firm to insure the accuracy of Bowman computer files. Any files that contain errors are sent back to Data Operations for correction. Where no mistake is found, the paralegal dictates a complaint, summons, verification and "Bowman Firm Form" that allows the plaintiff to reconstruct how the deficiency balance was established.

d. The file is then placed in a room reserved for attorney review. The attorneys have the complete loan file and the documents prepared by the paralegal. The attorney reviews the loan account file and the Bowman-generated documents to insure accuracy. If they are accurate, the attorney approves the complaint and summons.

e. The complaint is then forwarded with a cover letter to the client, along with a blank "Bowman Firm Form" that will allow the client to reconstruct how the deficiency balance was established. The client is also sent a verification form which requires the client to swear under oath that the balances sought are accurate.

f. Once the completed verification and "Bowman Firm Form" are returned, a paralegal reviews them to insure accuracy.

(continued...)

After filing the complaint, Bowman attempted to settle the case, sending Jenkins' attorney a letter on July 9, 1992. In the letter, Heintz characterized the letter as "an attempt to amicably resolve this matter." He further stated:

> I believe the parties have jointly focused on the fact that approximately 35 out of 48 payments on the contract were made although sporadic and delinquent. It would therefore indicate that approximately 13 payments of $236.71 were due or an additional approximate [sic] $3,000.00 was due. $3,000.00 added to the $4,173.00 for insurance along with the late charges on the contract along with the interest which was accrüing on all monies advanced for insurance approximately $8,500.00 balance in effect at the time of repossession.
>
> * * *
>
> If you have any questions or need additional information, please be in contact with me.

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[1] (...continued)

g. The account is again submitted to the attorney review room where the collection attorneys again review the complete file, including all original transmittal letters and information from the client, the computer information, and copies of the proposed pleadings. The attorney also reviews the client verification and the client completed "Bowman Firm Form." If after this final review the attorney is satisfied that everything is in order, the attorney signs the proposed complaint and submits the file to the Paralegal Department for processing and filing.

h. The file is finally transferred to the court typing department. The court typist reviews the file and prepares and processes the new suit and submits it to the appropriate court for filing.

Shortly thereafter, Jenkins filed a class action counterclaim against NBD, alleging causes of action for (1) breach of fiduciary duty, (2) two counts of breach of contract, (3) violation of the Illinois Consumer Fraud Act, and (4) conversion. That action is still pending in the Circuit Court of Cook County.

On March 3, 1993, Jenkins filed this action alleging that Heintz and the Bowman Firm violated the FDCPA when they attempted to collect charges for FPCI that allegedly included unauthorized "financial protection" coverage. Heintz and the Bowman Firm brought a motion to dismiss, claiming that as attorneys acting as litigators, they were not "debt collectors" under the FDCPA. This Court agreed and dismissed the action. The Seventh Circuit Court of Appeals disagreed with this Court's ruling and reversed and remanded. *Jenkins v. Heintz,* 25 F.3d 536 (7th Cir. 1994). The United States Supreme Court affirmed the decision of the Seventh Circuit. *Heintz v. Jenkins,* ___ U.S. ___, 115 S. Ct. 1489 (1995).

On July 18, 1995, Jenkins filed a second amended complaint in this Court, adding class action allegations.[2] Defendants brought this motion for summary judgment, claiming that if they had violated the FDCPA, the violation was the product of a "bona fide error", therefore, under §1692k(c), they are shielded from liability.[3]

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[2] This Court has not yet determined whether it will certify this case as a class action lawsuit.

[3] In addition, to the history of this case, Jenkins offers the following. Approximately six months prior to filing the complaint against Jenkins, Defendants provided NBD with a "legal analysis and formal opinion" regarding its Forced Placed Col-

(continued...)

II. DISCUSSION

A. Summary Judgment Standard

The movant is entitled to summary judgment when the papers and affidavits demonstrate that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once a moving party has met its burden, the non-moving party must go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial. *Becker v. Tenenbaum-Hill Associates, Inc.*, 914 F.2d 107, 110 (7th Cir. 1990). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When considering a motion for summary judgment, the court must view the facts, and all the inferences drawn from those facts, in the light most favorable to the nonmovant. *Griffin v. Thomas*, 929 F.2d 1210, 1212 (7th Cir. 1991).

B. The Fair Debt Collection Practices Act

Jenkins claims that Defendants violated two separate provisions of the FDCPA: sections 1692e and 1692f. Section 1692e prohibits debt collectors from using any false,

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[3] (...continued)
lateral Insurance Program. The "legal analysis" included a review of NBD's retail installment contract's forced place insurance language. In its letter, the Bowman Firm concluded that the current forced placed insurance language was not stated clearly enough. In addition, the letter commented that forced placed insurance was a "litigation hot spot" citing as an example the "Mellon Bank situation."

deceptive, or misleading representations to collect a debt. An example of conduct which violates this section is a false representation of the character, amount, or legal status of any debt. Section 1692f provides that debt collectors may not use unfair or unconscionable means to collect or attempt to collect any debt, which includes the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is *expressly* authorized by the agreement creating the debt or permitted by law. Jenkins claims that Defendants' attempt to collect unauthorized forced placed insurance charges constitutes a violation of both of these sections.

Section 1692k provides for civil liability against a debt collector who violates the FDCPA. Liability is limited, however, to intentional violations. Indeed, section 1692k(c) absolves a debt collector from liability where the violation was unintentional and where the debt collector had procedures in place to prevent the violation:

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Thus, assuming for purposes of this motion that Defendants violated FDCPA, Defendants have the burden of showing by a preponderance of the evidence that their attempt to collect the excess FPCI fee was unintentional and that they maintained procedures that were reasonably adapted to prevent the collection of unauthorized FPCI charges. It is upon this provision that Defendants rely in bringing this motion.

1. Defendants' Alleged Violation Was Not Intentional

Defendants claim that they had no knowledge of the true nature of the FPCI policy obtained by NBD on behalf of Jenkins, and, therefore, their attempt to collect the allegedly improper charge, was unintentional. In support of this claim, they offer the testimony of several Bowman Firm attorneys in which each claims to have no knowledge of the nature of NBD's FPCI practices. In response, Jenkins offers no direct rebuttal evidence; she offers instead only bits of circumstantial evidence, that even with the aid of multiple assumptions, do not create an issue of fact for trial. Specifically, Jenkins points to several pieces of evidence which, she suggests, establish that Defendants knew, or at least should have known, the nature of the Balboa insurance policy in question and that some of the coverage under that policy was unauthorized by Jenkins' loan contract.

Jenkins relies primarily upon the December 5, 1990 opinion letter sent by Bowman Firm partner Thomas Burris to NBD regarding NBD's FPCI language in the loan contracts. Burris first defines FPCI as "Comprehensive/Collision Insurance covering motor vehicles given to the Bank as security on consumer loans." Burris then acknowledges that FPCI is a "litigation hot spot." He based this conclusion both on his firm's experience—*successfully* litigating a number of counterclaims based on the legality of FPCI provisions—and the "Mellon Bank situation." The letter then goes on to evaluate the language in the loan contract which authorizes NBD to "force place" insurance on the debtor's vehicle in the event that the debtor fails to insure the car on his/her own. Although Burris found that NBD's language adequately informed its debtor's of NBD's right to purchase

FPCI, Burris suggested some changes to make the provisions even clearer. The opinion letter never addressed the type of policy to be purchased, or whether "financial protection" coverage was authorized by the contract language. In fact, it appears that the letter is premised upon the assumption that FPCI coverage purchased would be "Comprehensive/Collision Insurance." Thus, standing alone, the opinion letter does not contradict Defendants' contention that they had no knowledge that the FPCI policy in issue was not authorized by the terms of the contract.

Jenkins argues that Burris' reference to the Mellon Bank situation establishes knowledge. This argument also requires too many assumptions. The Mellon Bank case involved a lawsuit which challenged the legality of that bank's FPCI program, including policies issued by Balboa Insurance—NBD's FPCI provider. The case was the subject of articles in the June 1, 1990 edition of *Business Week* magazine and the May 1991 edition of *Business Lawyer*. (The Bowman Firm's library subscribes to both of these publications.) According to the *Business Week* article, one of the many allegations in that case was that some of Mellon's FPCI coverage was not authorized by the language of the underlying loan contract. Jenkins argues that because Bowman's library subscribed to *Business Week*, the attorneys must have known the details of the Mellon case, and therefore, they must have, or at least should have, known that NBD's policies were unauthorized. Again, this argument requires too many assumptions that are not supported by the evidence.

First, none of the attorneys has testified that he or she read either article. Moreover, even if the Court were to

assume that the Defendants had read the articles, or least knew about Mellon Bank, it does not establish that they knew that NBD was doing the same things with their FPCI program. To charge Defendants with such knowledge, the Court must assume that (1) certain "financial protection" coverage in Mellon Bank's FPCI was unauthorized by the loan contracts—a finding that was never made by any court; (2) Mellon Bank utilized the same Balboa Insurance policies as NBD—Jenkins provides copies of the Balboa policy that covered her vehicle but not the one at issue in Mellon Bank; and most importantly, that (3) Defendants knew that the NBD's contracts were the same or even similar to Mellon Bank's—a contention they deny. Without any evidence to support these assumptions, the Court cannot find that there exists a question of fact that Defendants knew about the nature of NBD's FPCI policies, much less that the policies were unauthorized by the loan contracts.[4]

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[4] Jenkins also offers as evidence of intent various documents that contain references to the costs of "skip tracing" and "repossession" for which NBD was allegedly reimbursed pursuant to FPCI policies. Jenkins argues that these recovered costs were clearly unauthorized by the underlying loan contract. From these documents Jenkins argues that Defendants must have known that the insurance covered more than mere collision or property loss. The Court cannot reach the same conclusion. First, the discovery "bates stamps" on the documents indicate that many of the documents offered were recovered from NBD and not Bowman. Second, the unrebutted testimony indicates that Defendants played no role in recovering those refunds or that they knew what they represented. Moreover, even if Defendants knew what the refunds represented, there is no evidence that they knew that such charges were illegal or unauthorized. Indeed, no court has found that such coverage is illegal.

Therefore, the Court finds that any violation of the FDCPA was unintentional.

2. Defendants' Procedures

Whether intentional or not, in order to use the bona fide error defense and succeed in their motion for summary judgment, Defendants must also prove that they had procedures in place reasonably calculated to avoid "any such error." Here, Defendants have offered unrebutted evidence of the procedure they followed when preparing to file suit to collect a debt. The Court holds that these procedures are indeed "reasonably adapted" to avoid the alleged error that occurred here, and, therefore, grants summary judgment in favor of Defendants.

As defined in her complaint, Jenkins claims that Defendants' violation was their attempt to collect a charge that was unauthorized by her loan contract. Thus, the Court must evaluate whether Defendants had in place procedures which were reasonably calculated to avoid collecting unauthorized charges.

As described above, Defendants and their various employees undertook to assure that all of the amounts they filed suit upon were accurate. In fact, each of the attorneys—Glenn Vician, Gerald Bowman, George Heintz and Deborah McPhee—testified that the firm's attorneys verify that charges such as attorneys' fees, interest and insurance, including FPCI, are authorized by the loan contract before authorizing the filing of a collection action. (Vician Dep. at 57-58; Bowman Dep. at 19-20; Heintz Dep. at 16-17; McPhee Dep. at 34-35). In addition, Defendants send the draft complaint and summons to the client to have the client verify, under oath, the

accuracy of the complaint. The client also must fill out a "Bowman Firm form" setting out, in detail, the various charges sought to be collected. It is only after the complaint, the signed verification and the completed Bowman Firm form are checked against the loan file, including the loan contract, that the complaint is filed.

Jenkins does not dispute that the firm performs such procedures, but only that these procedures are inadequate or are not reasonably adapted to prevent the collection of unauthorized insurance charges. Instead, Jenkins insists that the FDCPA requires Defendants to "investigate and evaluate the validity of charges imposed by their clients . . . ." (P1. Mem. at 9). In other words, Jenkins would require debt collectors to investigate every charge for which recovery is sought and to determine "whether an item is a legally valid charge . . . ." (*Id.* at 13).

The Court rejects this construction of the FDCPA. As one district court recently commented:

> A debt collector should be able to rely on the representation and implied warranty from its client that the amount was due under either the lease or the law. The FDCPA does not require an independent investigation of the information provided by clients when a debt collector tries to collect a debt, nor does it require the debt collector to dispute the creditor's construction of a contract.

Ducrest v. Alco Collections, Inc., No. 95-1708-A, 1996 WL 416738 at *3 (M.D. La. July 9, 1996) (citing *Smith v. Transworld Systems, Inc.*, 953 F.2d 1025, 1032 (6th Cir. 1992) (FDCPA does not require an independent investigation of the debt referred for collection); *Howe v. Reader's Digest Ass'n., Inc.*, 686 F. Supp. 461, 467 (S.D.N.Y.

1988)). Here, Defendants have outlined a procedure that was reasonably adapted to prevent the collection of unauthorized charges: the attorneys compared each of the charges to be recovered to the loan agreement to ensure that the charge was authorized. In addition, Defendants insisted that their client verify under oath that each of the charges was true and correct. The Court holds that these procedures were reasonably calculated to prevent the error that occurred here.

3. Bona Fide Error

Jenkins also argues that the alleged violation, if not intentional, constitutes an error of law against which section 1692k(c) provides no protection. *See Rutyna v. Collection Accounts Terminal, Inc.*, 478 F. Supp. 980, 982 (N.D. Ill. 1979) (ruling that §1692k(c) does not immunize mistakes of law, even if properly proven); *Baker v. G.C. Services*, 677 F.2d 775, 779 (9th Cir. 1982) (holding that reliance on the advice of counsel or a mistake about the law is insufficient by itself to raise the bona fide error defense); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989) (§1692k(c) does not excuse a mistaken view of the law); *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984) (per curiam). This Court, however, holds that this doctrine does not apply to this case.

First, there is no evidence that Defendants exercised any legal judgment as to the validity of these charges. Nor is there any evidence that Defendants relied on the advice of counsel. The evidence here is that Defendants attempted to collect a charge for collision insurance not knowing that the charge was for collision insurance *plus*

financial protection insurance. Thus, it can hardly be said that the decision to collect the Jenkins' debt was error in legal judgment.

Jenkins' argument apparently springs from her rather limited interpretation of the term bona fide error. She asserts that there are two types of errors: clerical, for which there is no liability, and non-clerical (or errors in legal judgment), for which there is.[5] Jenkins argues that because the alleged violation here was not "clerical," §1692k(c) provides no defense. Jenkins finds support for this construction in cases interpreting the Truth in Lending Act ("TILA"). The TILA and the FDCPA are not the same, in language or purpose.

The TILA bona fide error provision, 15 U.S.C. §1640(c), includes a sentence that the FDCPA, section 1692k(c), does not. In the TILA provision, Congress further defined bona fide errors as "clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error." The FDCPA contains no similar provision.

In addition to the difference in the language of the provisions, the Court notes that TILA and FDCPA serve different purposes. TILA was enacted to "assure meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and

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[5] Even if the Court were to accept Jenkins' interpretation, the Court believes that the violation alleged here more closely resembles a clerical error than an error in legal judgment.

unfair credit billing and credit card practices." 15 U.S.C. §1601(a). FDCPA, on the other hand, was enacted to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. §1692(e).

Because TILA requires that consumers be provided with uniform and accurate disclosures, it would appear reasonable to penalize lenders for errors because, regardless of the cause, the consumer is harmed. Moreover, because only the lender has access to the information regarding the terms of the loan, it is reasonable to hold the lender strictly liable for any mistakes in disclosure.

FDCPA, on the other hand, was enacted to prevent *abusive* debt collection practices, not mistakes, much less, a client's TILA violations. Thus, it would be reasonable to conclude that non-clerical errors, such as reliance on the accuracy of a client's disclosures, do not give rise to liability. Moreover, Jenkins' interpretation would require liability against both the lender and the debt collector for every TILA violation. The Court finds no support in the stated purposes of the statutes for such a conclusion. Thus, the Court holds that Jenkins' interpretation of the term "bona fide error" is inconsistent with both the language and purpose of the FDCPA.

Given the above analysis, the Court finds that there remain no genuine issues of material fact and that Defendants are not liable as a matter of law. Therefore, Defendants' motion for summary judgment is granted.

III. CONCLUSION

For the foregoing reasons, this Court grants Defendants' motion for summary judgment.

ENTER:

/s/ George M. Marovich
GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

DATED: September 16, 1996

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, IL 60604

October 23, 1997

Before

Hon. Kenneth F. Ripple, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*

DARLENE JENKINS,

Plaintiff-Appellant,

No. 96-3410 *v.*

GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & MCPHEE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 1332—**George M. Marovich**, Judge.

ORDER

Plaintiff-Appellant filed a petition for rehearing and suggestion for rehearing en banc on September 18, 1997. A majority of the panel voted to deny the petition for rehearing. A vote of the active members of the court was requested on the suggestion for rehearing en banc. A

majority of the active members of the court have voted to deny rehearing en banc.[1]

The petition for rehearing and suggestion for rehearing en banc is DENIED.

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[1] Circuit Judges Ripple, Rovner, and Diane P. Wood voted to grant rehearing en banc.

STATUTES INVOLVED

15 U.S.C. §1692k Civil liability

(a) Amount of damages. Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by the court. In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors—

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent. A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Jurisdiction. An action to enforce liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of Commission. No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

15 U.S.C. §1692b Acquisition of location information

(6) After the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

15 U.S.C. §1692c Communication in connection with debt collection

(a) Communication with the consumer generally. Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a

communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

15 U.S.C. §1692d Harrassment or abuse

. . . the following conduct is a violation of this section:

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

15 U.S.C. §1692e False or misleading representations

. . . the following conduct is a violation of this section:

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

15 U.S.C. §1692f Unfair practices

. . . the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly

authorized by the agreement creating the debt or permitted by law.

15 U.S.C. §1692j Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 813 [15 U.S.C. §1692k] for failure to comply with a provision of this title.

15 U.S.C. §1640(c) Unintentional violations; bona fide errors.

A creditor or assignee may not be held liable in any action brought under this section or section 125 [15 U.S.C. §1635] for a violation of this title if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this title is not a bona fide error.

[Received July 11, 1995]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

DARLENE JENKINS,	)	
	)	
Plaintiff,	)	
v.	)	93 C 1332
	)	
	)	Judge Marovich
GEORGE W. HEINTZ; and BOWMAN, HEINTZ, BOSCIA & MCPHEE,	)	Magistrate Judge Ashman
	)	
Defendants.	)	

SECOND AMENDED COMPLAINT

Plaintiff, Darlene Jenkins, complains as follows against defendants George W. Heintz ("Heintz") and Bowman, Heintz, Boscia & McPhee ("Bowman firm"):

INTRODUCTION

1. This action is brought to remedy defendants' repeated violations of the federal Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. ("FDCPA").

JURISDICTION AND VENUE

2. This Court has jurisdiction under 15 U.S.C. §1692k(d) and 28 U.S.C. §1331. Venue is proper in this District because the acts complained of took place here.

PARTIES

3. Plaintiff is an individual who resides in Chicago, Illinois. She is a "consumer" as defined by the FDCPA, 15 U.S.C. §1692a(3).

4. Defendant Heintz is an attorney and a partner in the Bowman firm, a law firm. Both defendants have offices at 1000 E. 80th Place, Merrillville, Indiana 46410.

5. Both defendants are regularly engaged for profit in the collection of debts allegedly owed by consumers, through correspondence and litigation. Each is a "debt collector" as defined in the FDCPA, 15 U.S.C. §1692a(6).

CLASS ALLEGATIONS

6. Plaintiff brings this action as a class action. Plaintiff tentatively defines the class as all persons from whom defendants demanded payment, through correspondence or suit, on behalf of Gainer Bank, now known as NBD Bank, premiums for purported automobile insurance.

7. The class is so numerous that joinder of all members is impractical. Gainer Bank, now known as NBD Bank, force placed insurance on the accounts of thousands of consumers. Many of these accounts were sent to defendants for collection.

8. There are questions of law and fact common to the class, which predominate over any questions affecting only individual class members. These questions include:

a. Whether the insurance in fact covered Gainer Bank/ NBD Bank against credit loss or default.

b. Whether the insurance was authorized to be added to the class members' indebtedness by the standard form contracts that defendants were purporting to enforce.

c. The appropriate amount of statutory damages to be assessed against defendants.

9. There are no individual questions relating to liability, other than whether a class member received one of the offending demands, which can be determined by ministerial inspection of defendants' records.

10. Plaintiff will fairly and adequately protect the interests of the class. She is committed to vigorously litigating this matter. She is greatly annoyed at being the victims of defendants' illegal practice and wishes to see that the wrong is remedied. To that end, she has retained counsel experienced in handling class claims and claims involving unlawful business practices. Neither plaintiff nor her counsel have any interests which might cause them not to vigorously pursue this claim.

11. Plaintiff's claim is typical of the claims of the class, which all arise from the same operative facts and are based on the same legal theories.

12. A class action is a superior method for the fair and efficient adjudication of this controversy. The very essence of defendants' conduct is to misrepresent that large sums added to the class members debts are for matters authorized by contract, when that is not the case. The class members have no reasonable means of knowing that the additional charges are not what they are represented to be. Accordingly, failure to permit a class action will result in a failure of justice.

DEMANDS FOR PAYMENT OF UNAUTHORIZED AMOUNTS

13. Defendants regularly collect debts for, among other persons, Gainer Bank, of Gary, Indiana, now known as NBD Bank ("NBD Bank"). NBD Bank has a large number of customers who signed retail installment contracts for the purchase of motor vehicles. Plaintiff is one such individual.

14. NBD Bank's contracts provided that the buyer will "keep the collateral fully insured against loss or damage," and that "if the Buyer does not pay the taxes on the collateral, [or] keep it insured . . . the Creditor can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect."

15. In fact, the insurance was "financial protection insurance" which covered NBD Bank against various types of defaults by the customer on his or her obligation, such as expenses incurred in repossessing a car from a consumer who defaulted, the failure of a customer to pay persons who performed work on the car, resulting in a mechanic's lien, and errors in perfecting security interests. The "financial protection insurance" also indemnified NBD Bank against liability which it might incur under federal law as a result of a breach of warranty by an automobile dealer or manufacturer (the "holder in due course endorsement").

16. The standard form contract between NBD Bank and its motor vehicle installment customers, including

Ms. Jenkins, did not authorize any such insurance to be charged to her account. NBD Bank could, of course, procure insurance against credit loss, as long as it did so at its own expense.

17. The insurance charged to Ms. Jenkins' account was not insurance authorized by any agreement between Ms. Jenkins and NBD Bank and could not be honestly represented as insurance on her automobile.

18. The Bowman firm had actual knowledge of the true nature of the insurance obtained by NBD Bank no later than April 1992. A complaint filed by the Bowman firm in April 1992 on behalf of NBD Bank (then known as Gainer Bank) includes amounts for "recovered repossession expense" paid by the Bank's insurance. "Recovered repossession expense" is not, of course, covered by insurance protecting a car against loss or damage. It is one of the coverages provided by the "financial protection" insurance that NBD Bank obtained.

DEMANDS FOR PAYMENT
OF UNAUTHORIZED AMOUNTS

19. On July 9, 1992, Heintz wrote the letter attached hereto as *Exhibit A*, demanding payment of a debt purportedly owed by Darlene Jenkins. The contents of *Exhibit A* were intended to be, and were in fact, transmitted to Ms. Jenkins. The indebtedness consisted primarily of premiums for insurance allegedly charged to Ms. Jenkins pursuant to the language quoted above.

FILING OF COLLECTION ACTIONS DEMANDING PAYMENT OF UNAUTHORIZED AMOUNTS

20. Over the last few years, Heintz and the Bowman firm filed numerous collection actions on behalf of NBD Bank in which the amount claimed included sums charged by the Bank, subsequent to the inception of the contract, purportedly for insurance against loss or damage to the collateral. Most resulted in default judgments or agreements by the customer to pay on some basis, undoubtedly made without knowledge of the true nature of the "insurance" charges.

21. One such collection action demanding payment for the unauthorized insurance was filed against plaintiff.

FRAUDULENT CONCEALMENT

22. While the collection actions against plaintiff and some of the class members were filed, and the demands against some class members were made, more than one year prior to the filing of this action, defendants fraudulently concealed their violation of the FDCPA by misrepresenting, both in the complaint and in correspondence such as *Exhibit A*, the true nature of the "insurance" for which payment was demanded.

23. Plaintiff and the class members had no knowledge of the truth and believed that the insurance procured was simply insurance against loss of or damage to the collateral until 1993. Accordingly, the statute of limitations is tolled.

24. Defendants continued to pursue their demands for payment of the unauthorized insurance by plaintiff until a date within one year of the filing of this action.

DAMAGES SUFFERED

25. The premiums charged in each case amount to $2,000 to $4,000. In addition, interest is charged on the premiums.

26. The inflated debt was reported to credit reporting agencies, damaging plaintiff's credit. Similar reports were made with respect to class members.

27. As a result of defendants' demand for payment, plaintiff has suffered mental anguish and injury to her credit and has been forced to expend time and money defending against such unauthorized demands.

VIOLATIONS COMPLAINED OF

28. Defendants violated the FDCPA in the following respects by sending letters, such as *Exhibit A*, demanding payment for the unauthorized insurance and filing collection actions demanding payment for the unauthorized insurance:

a. Defendants violated 15 U.S.C. §1692f, which prohibits "unfair or unconscionable means to collect or attempt to collect any debt," and defines "unfair or unconscionable means" to include adding amounts to the principal obligation "unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

b. Defendants violated 15 U.S.C. §1692e, which prohibits "any false, deceptive or misleading representation or means in connection with the collection of any debt," including "[t]he false representation of . . . the character . . . of any debt," and "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt."

WHEREFORE, plaintiff requests that the Court grant the following relief in her favor and against defendants:

a. The maximum amount of statutory damages provided under 15 U.S.C. §1692k.

b. Appropriate actual damages.

c. Attorney's fees, litigation expenses and costs.

d. Such other and further relief as is appropriate.

/s/ Daniel A. Edelman
Daniel A. Edelman

Daniel A. Edelman
Cathleen M. Combs
James O. Latturner
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EDELMAN & COMBS
135 S. LaSalle Street, Suite 2040
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(312) 739-4200
(312) 419-0379 (FAX)

Joanne S. Faulkner
123 Avon Street
New Haven, Connecticut 06511
(203) 772-0395

JURY DEMAND

Plaintiff demands trial by jury.

/s/ Daniel A. Edelman
Daniel A. Edelman

EXHIBIT A

(Letterhead of)

BOWMAN, HEINTZ, BOSCIA & McPHEE

PLEASE REFER TO OUR FILE NO.
238719

July 9, 1992

Attorney Steven Morton
Ste. 563, 221 N. LaSalle St.
Chicago, IL 60601

RE: Gainer Bank v. Darlene Jenkins
89M1-147179

Dear Mr. Morton:

This is a letter to follow up our recent telephone conversation in an attempt to amicably resolve this matter. I am enclosing the following documents and advising as follows:

1. Copy of the retail installment contract whereon I have highlighted on the reverse side revisions eight and twelve regarding having Darlene Jenkins keep the vehicle fully insured at all times and allowing the creditor, if the vehicle is not insured, to purchase such insurance add the price to the contract balance and shall be payable at the then annual percentage rate in effect.
2. This contractual default and failure to keep the vehicle properly insured happen four occasions. For your reference, I enclose herewith insurance information showing the Bank purchased insurance for periods of time - November 19, 1987 through April 11, 1991 and paid therefore the amount of

$4173.00. This amount plus the accruing contractual interest was added to the contract balance. After the vehicle was repossessed and ultimately sold, the last policy so purchased was canceled and there was a return refund premium of $347.00 which was properly applied to the account.

3. I believe that the parties have jointly focused on the fact that approximately 35 out of 48 payments on the contract were made although sporadic and delinquent. It would therefore indicate that approximately 13 payments of $236.71 were due or an additional approximate $3,000.00 was due. $3,000.00 added to the $4,173.00 for insurance along with the late charges on the contract along with the interest which was accruing on all the monies advanced for insurance approximately $8,500.00 balance in effect at the time of repossession.

This matter is next up for status on July 15, 1992 and hopefully we can discuss it prior to or at the status conference to reach some type of amicable practical resolution.

If you have questions or need additional information, please be in contact with me.

Very truly yours,

/s/ George W. Heintz
George W. Heintz
Merrillville Office
Member of Indiana & Illinois Bars

GWH/dk

Enclosure

Supreme Court, U.S.
FILED
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No. 97-1213

In The

Supreme Court of the United States

October Term, 1997

DARLENE JENKINS,

Petitioner,

vs.

GEORGE W. HEINTZ, BOWMAN, HEINTZ, BOSCIA & McPHEE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Petitioner, Darlene Jenkins ("Jenkins"), argues that the decision of the Seventh Circuit conflicts with several Court of Appeals decisions on all three aspects of this case (Jenkins pet. at 6). Jenkins can only arrive at this conclusion with respect to the first argument by distorting the holding of the Seventh Circuit majority opinion. Contrary to Jenkins' argument, the majority does not contradict the many cases holding that the Fair Debt Collection Practices Act ("FDCPA") is generally a strict liability statute. *See, e.g., Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996).

Jenkins also artificially creates a "split" among the circuits with respect to the second and third arguments by erroneously comparing: a) cases which forbid the use of the bona fide error defense when the defendant claims ignorance of the legal requirements of specific provisions of the FDCPA or its Truth In Lending Act analog, such as *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989), *Baker v. GC Services*, 677 F.2d 775 (9th Cir. 1982) and *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037 (8th Cir. 1984); and b) this case, where the error does not concern the legal requirements of the FDCPA itself, but instead relates to a bona fide error by the debt collector with respect to the validity of the creditor's contractual claims against the debtor, notwithstanding the maintaining of adequate procedures for detecting such errors.

Because the issues in this case are distinct from the cases cited by Jenkins, there is no split among the circuits necessitating Supreme Court intervention.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY APPLIED THE BONA FIDE ERROR DEFENSE OF THE FAIR DEBT COLLECTION PRACTICES ACT.

Jenkins argues that the Seventh Circuit has become a judicial rogue, imposing an intent requirement upon the basic prohibitory provisions of the FDCPA (Jenkins pet. at 7-9). Jenkins' argument is entirely disingenuous. Although the majority opinion indeed describes the issues on occasion by suggesting that a plaintiff must prove an intentional violation, the "unintentional violation" element of the bona fide error defense (15 U.S.C. § 1692k(c)) puts the debt collector's intent to violate the FDCPA into play, along with the requirement of establishing adequate procedures to detect violations of the type asserted. The majority's analysis of the evidence and the issues demonstrates that it understood that it was the burden of respondents, George Heintz and Bowman, Heintz, Boscia & McPhee (collectively "Heintz"), to prove by a preponderance of the evidence: 1) its lack of intention to violate the FDCPA; and 2) the adequacy of Heintz' procedures for detecting errors of the kind alleged by Jenkins. Accordingly, Jenkins' claim that the Seventh Circuit has become a law unto itself is simply erroneous.

Despite the isolated incidents of imprecise language, the majority opinion demonstrates its proper application of the bona fide error defense. Immediately before quoting the language of 15 U.S.C. § 1692k(c), the majority states that a debt collector is "absolved if the violation

was unintentional and procedures were in place to prevent it" (App. 6). That is exactly how Heintz approached the motion for summary judgment based upon the bona fide error defense, and how the majority analyzed whether there were genuine issues of material fact as to either element of the defense.

In its motion for summary judgment, Heintz recognized its burden to establish that although the letter it sent to Jenkins' attorney sought to collect premiums for a type of force placed insurance which was not authorized by Jenkins' agreement with Heintz' client, Gainer Bank, this prima facie violation of the Act was not intentional.[1] The majority's analysis of the evidence (App. 7-14) is entirely consistent with Heintz' main contention: that Jenkins could come forward with no credible evidence that any Heintz attorney knew that the premiums for force placed insurance it was attempting to collect on behalf of Gainer Bank were not authorized by Jenkins' loan agreement. Given the absence of credible evidence that a Heintz attorney knew of the invalidity of the charges, there was no genuine issue of material fact as to whether Heintz intended to collect an amount not authorized by the contact or intentionally made a false representation of the character of Jenkins' debt to Gainer Bank. Interestingly, Jenkins' petition takes no issue with the majority's conclusion that the evidence did not raise a

---

[1] Heintz has consistently stated that it is only conceding for the purposes of the motion for summary judgment that the force placed insurance premiums it sought to collect from Jenkins were not authorized by the contract.

genuine issue of material fact concerning Heintz' knowledge of the impropriety of the attempt to collect all of the force placed insurance premiums claimed by Gainer Bank.

The "bottom line" of the majority's analysis of the evidence of Heintz' alleged knowledge of the unauthorized nature of the charges it sought to collect is as follows (App. at 14):

> Jenkins' argument boils down to an assertion that given the information she uncovered in discovery . . . [Heintz] should have known that the bank was force placing unauthorized coverage. If the FDCPA assigned liability for negligent behavior, Jenkins' case might survive. But far too many assumptions must be made before it would be reasonable to infer [Heintz] actually knew, and then intentionally made a false representation as to the character of Jenkins' debt, as 15 U.S.C. § 1692 requires.

The plain language of the "false or misleading representations" section of the FDCPA (15 U.S.C. § 1692e) contains no mention of an intent requirement and, as Jenkins correctly points out, no court has imposed such a requirement (Pet. at 7). Obviously, then, the majority's discussion of the requirement of proving Heintz' knowledge of the falsity of the representation of the character of the debt only matters because Heintz asserted by affirmative defense that any violation it may have committed was unintentional.

In determining whether the Seventh Circuit's opinion comports with established precedent, this Court should look to the analysis employed and the substance of the

decision. While the majority does couch its decision in terms of an absence of a genuine issue of material fact with respect to Heintz' intention to violate the FDCPA, this must be read in the context of the raising of the bona fide error defense and the lack of a significant factual challenge to the adequacy of the procedures used by Heintz to detect errors of this kind.[2]

Ultimately, the majority evidences its understanding of the proper allocation of burden of proof (App. at 20-21):

> Section 1692k(c) requires that the debt collector show by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

This is exactly what the statute provides. The majority's analysis of the evidence of: 1) Heintz' procedures for verifying the validity of debts; and 2) Heintz' lack of knowledge of the impropriety of the charges claimed by Gainer Bank is entirely consistent with the plain language of section 1692k(c). Consequently, this Court should reject Jenkins' characterization of the majority opinion as requiring a plaintiff to prove intent to violate the FDCPA as part of her prima facie case.

---

[2] Of course, Jenkins challenges the sufficiency of the procedures employed by Heintz for determining the *legal* validity of the amounts the bank claims are due and owing, but that is only relevant to Jenkins' second point. Jenkins does not challenge the *bona fides* of the detailed procedures followed by Heintz for verifying Gainer Bank's claims against debtors. App. at 20.

II

JENKINS' CONCEPTION OF THE BONA FIDE ERROR DEFENSE CONFLICTS WITH THE PLAIN LANGUAGE OF THE ACT, AND IS INCONSISTENT WITH CONGRESS' INTENTION TO TREAT ATTORNEY DEBT COLLECTORS THE SAME AS LAY DEBT COLLECTORS.

Jenkins begins section II of her petition with a gross oversimplification of the majority's holding with respect to the adequacy of procedures necessary for an attorney debt collector to satisfy the second element of the bona fide error defense.

> The Seventh Circuit also held that the bona fide error provision of the FDCPA does not require collection attorneys to exercise legal judgment while collecting debts through litigation. Pet. at 11.

More precisely, the question confronting the Seventh Circuit was whether an attorney debt collector may satisfy the "adequate procedures for detecting errors" element of the bona fide error defense without conducting a plenary review of the validity and collectibility of each charge claimed to be due and owing by the creditor client. As the majority held, if the collection attorney cannot assert the bona fide error defense without conducting a legal analysis of each of the creditor's claims, he is improperly held to a different standard than lay debt collectors and, effectively, cannot assert the defense against certain claims (App. 17-18):

> Pursuant to Jenkins' reading, the [FDCPA] would limit a debt collector to only collecting

> legally valid claims. But under this interpretation, there could not be a bona fide error for attempting to collect a claim not legally authorized by the contract with the debtor. So the bona fide error defense would be read out of the statute with respect to the violations of 15 U.S.C. §§ 1692e and 1692f alleged by Jenkins. "It is an elementary canon of construction that a statute should not be interpreted so as not [sic] to render one part inoperative" (citations omitted).

Jenkins, however, sees no harm in a double standard for attorneys asserting the bona fide error defense, despite her successful argument to this Court that the 1986 repeal of the blanket attorney exemption from liability was intended to level the playing field for attorney and lay collectors. *Heintz v. Jenkins*, 514 U.S. 291 (1995). She now shifts gears.

> Congress repealed the attorney exemption in the first place because Congress found that "bar associations have failed to fulfill their obligations underlying the premise of the attorney exemption" (citation to history omitted).
>
> * * *
>
> Under the Seventh Circuit's decision, attorneys are again free to use their status and power as attorneys for the benefit of creditors without assuming the responsibilities that Congress sought to impose upon them when it repealed the attorney exemption and that this Court solidified in *Heintz*. Pet. at 12-13.

This argument is pure misdirection. The repeal of the attorney exemption was motivated by the abuse of the blanket exemption granted to attorneys in the original

version of the FDCPA. Congress amended the FDCPA in response to attorneys who were marketing themselves to creditors by virtue of their ability to use the rough-and-tumble collection tactics forbidden to their lay competitors. H.R. Rule No. 405, *U.S. Code, Cong. and Admin. News,* 1754-55.

Jenkins' reference to the "responsibilities" of collection attorneys as including a pre-collection legal analysis far beyond what is required of lay collectors assumes that the repeal of the attorney exemption from liability meant that Congress intended to hold attorneys to a higher standard than lay collectors. Nothing in the plain language of the FDCPA supports such a result, and this Court's leveling of the playing field in *Heintz* contradicts such a notion.

Jenkins argues that the Seventh Circuit's decision will give creditors free reign to "pad" claims with unauthorized charges, then turn the matter over to a collection attorney, who supposedly may immunize himself from FDCPA liability via the bona fide error defense (Pet. at 13-14). This is absurd. The proposition that the majority opinion gives an attorney "free reign to pad" is inconsistent with what the bona fide error defense allows and how attorneys generally conduct their practices. An attorney debt collector thinking of attempting to collect on his client's "thrown-in" claims should be aware that if any claim proves meritless, he must be prepared to defend against a strict liability claim in which he will be liable for his opponent's attorney fees if he loses. He will bear the burden of showing that he had adequate procedures in place for determining that the claim was valid,

and he must also show that he had absolutely no knowledge that the amount he sought to collect was unauthorized. Attorneys being generally risk-averse, this threat of wholesale debt padding is pure alarmism.

Moreover, this argument flies in the face of the uncontested facts in this case. If Jenkins is trying to paint Heintz' conduct in this case as "looking the other way," she grossly distorts the record. Like most responsible attorneys, Heintz went to great pains to verify the amounts due and owing to his client. He had an officer of his client sign the functional equivalent of an affidavit verifying that he had reviewed Jenkins' file and that the charges sought by the bank were consistent with their agreement. Both the district court and the Seventh Circuit held that the FDCPA expects no more of an attorney debt collector.

Jenkins argues that the majority opinion conflicts with the Seventh Circuit's decision in *Avila v. Rubin*, 84 F.3d 822 (7th Cir. 1996). In *Avila*, a collection attorney was held to have sent out misleading dunning letters to debtors. The letters were deemed misleading because although they bore an attorney's signature, the attorney had delegated all responsibility for issuing the letters to nonattorney subordinates. The Seventh Circuit held that the unsophisticated consumer would be misled into believing that a letter bearing an attorney's signature was authored by an attorney familiar with the targeted debtor's rights and liabilities.

Jenkins tries to squeeze out an inconsistency where none is present. She argues that one Seventh Circuit decision (*Avila*) stands for the proposition that the FDCPA requires an attorney to exercise legal judgment

while acting as a debt collector, while the majority opinion in the instant case does not.

This argument fails because it ignores the critical difference between the contexts of the two cases. *Avila* involved a core, prohibitory provision of the FDCPA: the illegality of making false and misleading communications to the debtor. *Avila* does not stand for the proposition that a collection attorney *must* always independently analyze the legal merits of his client's claims. Instead, it stands for the proposition that if a communication with a debtor carries the false implication that an attorney has exercised professional judgment, the attorney has committed a basic violation of the statute by misleading the unsophisticated consumer. Unlike the instant case, the issue of bona fide error never enters into such a case, nor could it, as Heintz will demonstrate below.

Instead of creating a split among the lower courts, the majority opinion is entirely consistent with several reported decisions concerning the basic requirements for asserting the bona fide error defense. In both *Smith v. Transworld Systems,* 953 F.2d 1025 (6th Cir. 1992), and *Lindberg v. Transworld Systems, Inc.,* 846 F.Supp. 175 (D. Conn. 1994), it was held that the FDCPA does not require that the creditor conduct an independent investigation of the debt before attempting to collect. In *Lindberg,* for example, the collection agency attempted to collect an amount which, according to the plaintiff, was not validly due and owing because the statute of limitations had run. The court affirmed summary judgment for the defendant.

In *Hubbard v. National Bond & Collection Ass'n,* 126 B.R. 422 (D. Del.), *affirmed without opinion,* 947 F.2d 935

(3d Cir. 1991), the court held that the "false representation of the character of the debt" provision of 15 U.S.C. § 1692c did not apply to an unintentional violation. The court bolstered its characterization by referring to the bona fide error defense of 15 U.S.C. § 1692k. More specifically, both *Lindberg* and *Hubbard* state that a debt collector need not investigate the "background" of the debt before instigating collection proceedings.

Also, in *Ducrest v. Alco Collections, Inc.*, 1998 WL 416738 (M.D. La. 7/9/96), the court stated as follows with respect to a collector's obligations (Op. at 3):

> The FDCPA does not require an independent investigation of the information provided by clients when a debt collector tries to collect a debt, nor does it require the debt collector to dispute the creditor's construction of a contract.

Here, the issue is strictly a construction of the bona fide error defense in the context of the term "debt collector". After the 1986 amendments, the FDCPA does not differentiate substantively between lay and attorney debt collectors. Accordingly, the majority's analysis of the adequacy of Heintz' procedures without reference to their professional status is consistent with both the letter and spirit of the statute.

III

JENKINS RELIES UPON DISTINGUISHABLE CASES AND THE DISTINGUISHABLE TRUTH IN LENDING ACT BONA FIDE ERROR DEFENSE TO CREATE A SUPPOSED INCONSISTENCY BETWEEN THE SEVENTH CIRCUIT DECISION AND ESTABLISHED LAW.

Jenkins begins Argument III much as she began Argument II – with the exaggerated claim that the FDCPA does not absolve debt collectors for "errors of legal judgment"(Pet. at 20-21). She cites the Truth In Lending Act's similar bona fide error defense, which has been construed as not allowing "errors of law" as bona fide errors. She also cites three FDCPA cases, *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989), *Baker v. GC Services*, 677 F.2d 775 (9th Cir. 1982) and *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037 (8th Cir. 1984), for the proposition that a collector cannot claim bona fide error for an error in legal judgment.

These cases cannot be validly compared to the instant case. All of these cases involve violations of specific provisions of the FDCPA by a debt collector, who then claimed bona fide error based upon legal advice or misinterpretation concerning the requirements of the FDCPA. Such is not the case here. The "legal error" here does not concern what the FDCPA itself requires; it concerns only an error with respect to the legal merits of the creditor's claim, and whether the attorney/collector was legitimately unaware of the invalidity under the contract of one of the charges he was seeking to collect.

This is an important distinction. If a debt collector could escape liability by asserting that he did now know

that he had to comply with the specific requirements of the Act, such as the limitations with respect to communications (§ 1692c) or the debt validation requirement (§ 1692g), the provisions could be rendered inoperative. However, with respect to attempting to collect a debt not authorized by the contract or law, an error of that kind does not come about because of ignorance concerning the prohibitory provisions of the Act. Instead, the error arises out of a mistake with respect to the amount shown or to the scope of the creditor's rights under the contract or the law. The integrity of the regulations contained in the Act is not threatened by allowing that kind of "legal error" to be considered a bona fide error under § 1692k(c) in the appropriate case.

Finally, Jenkins argues that the majority opinion allows the bona fide error defense of the FDCPA to be construed differently than the parallel defense from TILA. The majority held that the bona fide error defense of TILA (15 U.S.C. § 1640(c)), is distinguishable from the FDCPA bona fide error defense because it specifically excludes "errors of legal judgment with respect to a person's obligations [under TILA]" from the defense. App. 15, n.7.

Not only is this distinction correct as a matter of statutory interpretation, since Congress could certainly have included this same limitation in the FDCPA bona fide error defense had it meant to make the provisions identical, but it comports with the different natures of the two statutes. TILA is a "full disclosure" statute. The provisions and accompanying regulations set forth in detail what a consumer/debtor must be told before borrowing or engaging in a retail credit transaction.

The FDCPA, while containing elements of disclosure (the 30-day debt validation notice (15 U.S.C. § 1692g), the mini-Miranda warning (15 U.S.C. § 1692e(11)), is more of a prohibitory statute. The main thrust of FDCPA is to set forth broad categories of prohibited debt collection activity, leaving it to the courts to determine whether a particular form of conduct falls within the broad prohibitions enumerated.

This distinction in purpose between the two statutes mandates a different application of their bona fide error defenses. Under TILA, it would defeat the purpose of the detailed statutory/regulatory scheme if a mandatory disclosure were not made, but the lender/retailer could simply claim he did not know that disclosure was required. That it is why it is explicitly set forth that an error with respect to TILA's requirements is not a defense.

Under the FDCPA, on the other hand, given the broad prohibitory language of its provisions, particularly those provisions at issue in this case (using an "unfair or unconscionable means to collect a debt"; any false representation of the "character" of any debt), the defense should be more liberally applied than in TILA. As set forth above, while an error regarding a specific, technical requirement of FDCPA may not be excused by the bona fide error defense, any error relating to the legal niceties of the creditor's claim should fall directly within the scope of the bona fide error defense, so long as the error was unintentional and detailed procedures for detecting errors were in place.

Finally, as set forth above, the error in this case does not concern the requirements of the FDCPA itself. Heintz is not contending that they committed a bona fide error of legal judgment with respect to the Act's mandated disclosures or broad categories of prohibited activity. Their claim is that they were legitimately unaware that the contract between Gainer Bank and Jenkins did not allow them to seek all charges for force placed insurance. Because of that error, which does not pertain to the requirements of the Act *as such*, they may have unintentionally sought collection of an amount not authorized by the contract or law. That is the type of bona fide error that the Act was intended to cover, regardless of the professional status of the collector.

CONCLUSION

For these reasons, respondents, George W. Heintz and Bowman, Heintz, Boscia & McPhee, respectfully request that this Court deny the petition for certiorari.

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